Flores settlement, and therefore the settlement should be abrogated. The Court held that the two holdings could be reconciled if the parent could decide whether to be detained with their children or allow their children to be released from custody. But the right to reunification was constitutional, not based on the *Flores* settlement.

Furthermore, while the *Flores* settlement contains generic statements about the safety of minors and "least restrictive settings," that is not enough to mandate or forbid some activity under the DFE. Similarly, plaintiffs argue that the CBP policy manual had directives to "maintain family unity to the greatest extent possible." In general, references to manuals and other informal sources of policy are disfavored. *Reyes-Colon*, 974 F.3d at 60-61. This is especially true where the agency in question uses statute and regulations. *Irving v. United States*, 162 F.3d 154, 165-66 (1st Cir. 1998) (en banc). However, as discussed above, there have been few statutes or regulations regarding the detention of families, which is why the *Flores* settlement is still binding. Still, I do not think the text of the manual gives enough information. It might be relevant to the second step, discussed below, but it does not prescribe a particular course of action to officers.

2. The TVPRA

The plaintiffs also argue that the government had no discretion to classify the children as UACs under the TVPRA. Again, the TVPRA defines a UAC as a noncitizen with no parent or legal guardian available to care for them in the United States.

With regard to Family O, E.O. was living in Massachusetts and available to care for his children. Therefore, his children were never UACs because there was always a parent available to care for them. *D.J.C.V. v. United States*, No. 20 CIV. 5747 (PAE), 2022 WL 1912254, at *26 (S.D.N.Y. June 3, 2022). There is case law holding that ORR has no authority to detain non-UACs. *Maldonado v. Lloyd*, No. 18 CIV. 3089 (JFK), 2018 WL 2089348, at *6 (S.D.N.Y. May 4, 2018). Therefore, there was no discretion to hold the children of Family O in custody because the government lacked any authority to do so. Although not at issue at this stage of the litigation, my guess is this would create a relatively small class.

Family C presents a harder case because there was no guardian in the country once the family was separated. *Cf. D.J.C.V.*, 2022 WL 1912254, at *26 (holding that *after* the father was released, his child was no longer a UAC). The plaintiffs cite a congressional memo condemning family separation, "[c]hildren who are apprehended by DHS while in the company of their parents are not in fact 'unaccompanied' and if their welfare is not at issue, they should not be placed in ORR custody." H. Rep. No. 109-79, at 38 (2006). That is not even an interpretation of the TVPRA, which was passed two years later, It is a statement of Congress' preferred policy goals. Insofar as those were not written into the TVPRA, I don't think you can import them.

In sum, even if the TVPRA does not *mandate* family separation, it is not clear—like the *Flores* settlement—that it *forbids* family separation, at least after the government has taken some separate action against a parent.

3. The family separation policy

Finally, the plaintiffs argue that the line officers had no discretion because their actions were mandated by executive policy. That policy consisted of (1) an unofficial policy to separate families crossing the southern border and (2) the official "zero tolerance policy" adopted in April, 2018. To the first policy, the First Circuit is very skeptical of claims that informal policy can constitute a policy under the first prong, especially when there are statutes and regulations governing the conduct in question. *Irving*, 162 F.3d at 165-66. To the second, the complaint specifically disclaims the "zero tolerance policy" as mandating these separations, noting that they occurred before and after the policy and during the policy when detainees were not prosecuted.

That said, if you find that there was a policy, I would not follow defendant's arguments. It argues that if a policy was made pursuant to a discretionary power, its implementation, even if mandatory, is protected by the DFE. This argument was followed by a District Court in a family separation case. *Peña Arita v. United States*, 470 F. Supp. 3d 663 686-87 (S.D. Tex. 2020).

However, the defendant and the District Court confuse two issues. The FTCA does not allow plaintiffs to allege that policy was adopted negligently, or that the policy is negligent. But the DFE does not bar suits when policies *mandate* tortious conduct. Most of the time, as discussed above, the DCE exception would apply to these cases. But not when the conduct is mandated by a *policy*, rather than a regulation or statute. *Garcia-Feliciano v. United States*, 2014 WL 1653143, *3-4, & n. 8 (D.P.R. Apr. 23, 2014). Holding otherwise would make the DCE superfluous with regard to regulations and statutes and extend its protections to policies.

The defendant argues that it was not the way the line officers implemented the policy, but *that* they implemented the policy, which means it is the decision-makers and not the line officers who caused the harm. But that also confuses the issue, because if the concern had been the *way* line officers implemented the policy, it would also fall under the DFE because the policy would not have prescribed a specific course of conduct.

In sum, if there was a mandatory policy of separating families, the DFE cannot apply. If you find for the plaintiffs on any of the above theories, there is no need to address the second prong.

b. The Second Prong – is this susceptible to policy analysis?

The second prong of analysis concerns the implementation. The question is whether this was mere implementation of settled policy priorities or is susceptible to a weighing of competing policy priorities. *Hajdusek v. United States*, 895 F.3d 146, 150 (1st Cir. 2018). It does not matter if actual deliberation occurred. *Id.* Also, if this prong is even reached, there is a presumption in favor of the government. *Id.* But even if the decision was "nominally discretionary, [it] may pass a threshold of objective unreasonableness such that no reasonable observer would see [it] as susceptible to policy analysis." *Id.* at 152; *see also Davallou v. United States*, 998 F.3d 502, 505 (1st Cir. 2021). This is a case-specific, fact-specific inquiry. *Shanksy v. United States*, 164 F.3d 688, 693 (1st Cir. 1999)

The defendant argues, consistent with the prior prong, that decisions about how and where to house non-citizens are precisely the type of decisions that are amenable to discretion. *Santana-Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003) (in general, classifying and housing prisoners is susceptible to policy analysis).

The plaintiffs' best argument is that these decisions were so extreme as to not be susceptible to policy analysis. Although I do not think the manual or *Flores* settlement are good enough to establish a policy for the first prong, I do think they establish settled priorities for the second prong. The manual is clear that only legal requirements, "or an articulable safety or security concern" can justify separation. And children are to be put in the "least restrictive setting." But here, the conduct is not susceptible to policy analysis because the only conceivable reason for separating these families was for "the in terrorem effect it may have on others." *D.J.C.V.*, 2022 WL 1912254, at *16. That is not one of the valid priorities in the manual or in *Flores*.

The defendant argues that decisions about family separation are generally susceptible to policy analysis. That is true. But the question is whether *these* decisions are susceptible to policy analysis. Because there was no conceivable safety, security, or legal reason to separate these families (or similarly situated families), the defendant's arguments fail.

ii. DFE based on constitutionality of action

The plaintiffs primarily rely on the argument that the DFE does not apply to unconstitutional conduct. This is the doctrine relied on by district courts who have found for plaintiffs in these cases. This is probably their strongest argument, but the contours of the doctrine are unsettled.

a. Doctrine

The First Circuit has held that unconstitutional actions are not protected by the DFE. *Limone v. United States*, 579 F.3d 79, 101-02 (1st Cir. 2009); *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003). That is the position of most circuits. *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) (collecting cases); *but see Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972) (the DFE applies even where there are established constitutional violations).

However, it is not clear exactly how this works. In *Limone*, the unconstitutionality of the action had been established in a prior case. 579 F.3d at 102. But the Court never suggested that was a requirement, only that the unconstitutionality of the conduct at issue could not be disputed. In *Thames*, which established this doctrine in the First Circuit, the Court noted that this doctrine applies to actions that "are unconstitutional, proscribed by statute, or exceed the scope of an official's authority." 350 F.3d at 254. It then went on to determine whether the employees' actions exceeded their official authority. *Id.* at 254-55. It did not matter that the limits of the authority were not established in a prior case. Similarly, courts in this district have engaged in analysis similar to that of a 12(b)(6) motion to determine if the facts allege a constitutional violation. *Gill v. United States*, 516 F. Supp. 3d 64, 80-81 (D. Mass. 2021). Other courts have been more cursory, and noted that a constitutional violation has been pleaded, so the DFE does not apply. *Estate of Davis v. United States*, 340 F. Supp. 2d 79, 93 (D. Mass. 2004).

This all suggests courts are free to find a constitutional violation even if a previous court has not found one. However, I would also not recommend allowing plaintiffs to bypass the DFE by simply claiming the conduct was unconstitutional—there must be a substantive analysis.

Here, the plaintiffs put forward a substantive due process claim, alleging interference with family integrity.

b. Constitutional violation

The closest First Circuit case is *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007). There, ICE raided a factory in New Bedford, and detained most of the workers, many of whom were undocumented. *Id.* at 6. Because of a shortage of beds, hundreds of workers were transported to Texas the next day. *Id.* The detainees filed a complaint alleging, among other things, interference with family integrity in violation of substantive due process. *Id.* at 7.

Because it is aimed at the conduct of the executive branch, these types of claims require a threshold test that the conduct "shocks the conscience." *Id.* at 21. This requires something beyond negligence, usually something with a purpose to cause harm that is not justified by a government interest. *Id.* at 21-22. In *Aguilar*, the Court noted that ICE had attempted to coordinate with social services and had released several detainees for humanitarian reasons; it concluded that the harm was the result of "ham handed" enforcement rather than the product of willful malice. *Id.* at 22-23. Furthermore, it held that the "evenhanded" enforcement of immigration laws cannot shock the conscience. *Id.* at 22.

Turning to the constitutional violation itself, the Court concluded that the interference was "transitory in nature" and contrasted it with more permanent interferences with family integrity. *Id.* at 23. However, they did hold that "[w]ere a substantial number of young children knowingly placed in harm's way, it is easy to imagine how viable claims might lie." *Id.* at 22.

There is a split of authority on whether the family separation policy was unconstitutional. Thus, this is not a case where you are deciding constitutionality on a blank slate. Instead, you can decide which cases are more persuasive and can be squared with the binding precedent in *Aguilar*.

The Fourth Circuit has held that family separation does not violate the constitution, reasoning that there is no "right to family unity in the context of immigration detention pending removal." *Reyna as next friend of J.F.G. v. Hott*, 921 F.3d 204, 210 (4th Cir. 2019). While the court in *Aguilar* was skeptical given the transitory nature of the interference, it also acknowledged such a claim was theoretically viable; the Fourth Circuit's categorical dismissal of such claims is inconsistent with *Aguilar*.

In *Ms. L v. ICE*, the Southern District of California discussed *Aguilar* at length. 302 F. Supp. 3d 1149 (S.D. Cal. 2018). First, the Court noted that the only constitutional violations being alleged were against the "Government's separation of migrant parents and their minor children when both are held in immigration detention [but not criminal detention] and when there has been no

showing the parent is unfit or poses a danger to the child." *Id.* at 1162. That applies to the plaintiffs. Furthermore, there, as here, all the plaintiffs were seeking asylum. *Id.* at 1164. Unlike *Aguilar* and related cases, where the children were not detained at all, the court noted that the plaintiffs were not separated from their children as an *incident* to detention—they were initially detained *with* their children. *Id.* at 1162-64. And the Court specifically noted that the exception in *Aguilar*—"a substantial number of young children knowingly placed in harm's way"—applied. *Id.* at 1165. Therefore, the conduct both shocked the conscience and violated the constitution. Other district courts have reached similar conclusions. *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116 (N.D. Ill. 2018); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111 (D.D.C. 2018). As in *Ms. L.*, these cases are all limited to cases where the plaintiffs were detained at the border with their children and separated, but not charged with a crime—or were separated when charged with a crime but kept separated after charges were dropped.

This is a close case under *Aguilar*. Both families were separated for about a month (though, for Family C, the time spent in criminal detention cannot be counted—so it is probably closer to two weeks). On the one hand, the exception seems to be met and the plaintiffs have alleged willful attempts to harm children to deter immigration. On the other, the language in *Aguilar* contrasts permanent or significant interference with the transitory nature of immigration detention. While I think the *Aguilar* court is being blasé about the nature of the harm, the opinion is controlling. Still, I tend to side with the plaintiffs and think a ruling in favor of the plaintiffs would be consistent with *Aguilar*.

c. Qualified Immunity

Defendant insinuates *Limone* was wrongly decided. That can be dismissed out of hand. It then argues that if the DFE does not apply to unconstitutional actions, the doctrine of qualified immunity must be imported into the FTCA.

This is an open question in the First Circuit. *Soto-Cintron on behalf of A.S.M. v. United States*, 901 F.3d 29, 35 n. 4 (1st Cir. 2018) (declining to answer this "significant question."). However, *Soto-Cintron* does cite a line of cases in the First Circuit that have held—at summary judgment—that the requirement in Puerto Rico law that the plaintiff in a false arrest or false imprisonment lawsuit "lack reasonable cause" is functionally equivalent to a qualified immunity analysis. *Id.* at 33-35. The Court buttresses its conclusion by referencing Puerto Rico courts that have discussed the trade-off between allowing law enforcement to do their jobs and compensating legitimate victims. Because those are summary judgment cases and that doctrine is specific to Puerto Rico law it is not applicable to this case.

A recent case from this district seemed to assume something like qualified immunity applied, but it did not explain why it was adding that qualification. *Estate of Rahim v. U.S.*, 506 F. Supp. 3d 104, 122 (D. Mass. 2020). That should be disregarded.

The Third Circuit seems to have incorporated qualified immunity into the FTCA in passing. *Bryan v. United States*, 913 F.3d 356, 364 (3d Cir. 2019). The Court simply asserts after doing a qualified immunity analysis (in which it only decides the right was not clearly established) that the qualified immunity analysis forecloses an argument that the DFE does not apply. Because the

Court does not analyze this, and because it would be a huge doctrinal development, I do not recommend putting much stock in it.[5]

Furthermore, the position should be rejected on the merits. Qualified immunity is justified, ostensibly, to prevent officers from being *personally* liable. But the FTCA allows suits against the United States, so the animating rationale does not apply. The FTCA and constitutional actions are "parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980).

Furthermore, the doctrine of qualified immunity is ultimately statutory interpretation—what Congress intended in 1800s when it allowed liability for constitutional violations by state officials. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). The decision to extend an identical immunity to federal officials in *Bivens* actions was an exercise in federal common law given that *Bivens* is entirely court-made. *Butz v. Economou*, 438 U.S. 478, 503-04 (1978). Defendant cites *Butz* extensively, but it is inapplicable: here there is a *statute*, the FTCA.

Because there is a statute, any immunity must come from the statute, not federal policy. Congress already imported something like qualified immunity into the statute: the DCE. The DCE bars "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). In some ways the DCE is broader than qualified immunity because there is no requirement of good faith: the United States is shielded from enforcing even obviously unconstitutional statutes or regulations. But in other ways it is narrower: it does not include policies, only statutes and regulations. That weighing should not be frustrated by importing qualified immunity.

This is also why the discussion in *Welch* is not applicable, though cited by the defendant. 409 F.3d 646 (4th Cir. 2005). There, the Court noted that when an officer implements, while exercising due care, an unconstitutional statute or regulation, the DCE shields the United States from liability because "it is the purpose of the *due care provision* to 'bar tests by tort action of the legality of statutes and regulations.'" *Id.* at 653 (emphasis added). By contrast, when an officer's conduct or even official policy is unconstitutional, the DCE does not apply. The same concerns about "testing" the constitutionality of statutes and regulations do not apply to policy and conduct.

This also undercuts the government's policy rationale for this rule: every time the government does something that *might* be unconstitutional, the DFE would not apply, destroying the DFE. But if what is unconstitutional is a statute or regulation, the DCE applies and defeats liability (assuming it was not negligently implemented).

I'm also just skeptical of the government's parade of horribles. There are many torts that do not implicate constitutional issues. Similarly, there are many unconstitutional actions that do not create common law tort liability. (E.g., a First Amendment violation). *Limone*, 579 F.3d at 102 n.

[5] The decision also arguably conflicts with earlier Third Circuit precedent establishing that constitutional violations cannot be shielded by the DFE. *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988).

13 (unconstitutionality defeats the DFE, but does not supply the plaintiff with a basis for liability—that comes from tort law). The government must do something—or the plaintiff must plead something—that is *actually* unconstitutional. It requires, at the very least, an analysis similar to one that a court would do during a 12(b)(6) motion. Also, *Limone* has been the law of this circuit for almost two decades, has been applied by district courts without references to qualified immunity, and—to my knowledge—there have not been an explosion of FTCA cases that seek damages every time there is an allegedly unconstitutional action.

D. Private Person Analogue

Finally, there must be a state law, private person analogue for the conduct alleged in order for the FTCA waiver of immunity to attach. That is fairly easily met here.

i. State law immunities / limitations.

Before continuing the standard analysis, I will address an outlier. A court in this district has extended the quasi-qualified immunity doctrine from *Soto-Cintron* and held, in a motion to dismiss, that if a state would *immunize* a military officer from torts, then it cannot be sued under the FTCA either because there is no private person analogue. *Davallou v. Ancient & Honorable Artillery Co. of Massachusetts*, No. CV 18-10822-LTS, 2019 WL 3546665, at *5 (D. Mass. May 23, 2019).

I think you should reject the extension. The Supreme Court has held that you look to state law private person analogues, not state law government analogues. *United States v. Olson* 546 U.S. 43, 46-47 (2005). That approach would also functionally bar the FTCA in less plaintiff-friendly states. *Davallou* works in Massachusetts because Massachusetts allows torts against officers. Texas, for instance, has a very strong doctrine of sovereign immunity. Under *Davallou*'s reasoning, there would be virtually no FTCA claims against federal officers in Texas. That cannot be right. Also, that reasoning was not followed in the First Circuit's affirmance. *See generally Davallou v. United States*, 998 F.3d 502 (1st Cir. 2021).

ii. Standard Analysis

The defendant argues there is no private person analogue here because only the United States has the power to make immigration decisions.[6] Any argument that the government is shielded merely because the action is something "unique" to the government is foreclosed by Supreme Court precedent: the question is whether there are "like circumstances" under which a private person would be liable. *Olson* 546 U.S. at 46-47.

In the First Circuit, there are governmental functions that do not have any "like circumstances." But in these cases there is no common law tort, other than strained negligence claims. *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 537 (1st Cir. 1997) (finding that a mere failure to perform regulatory functions cannot give rise to liability under the FTCA); *Gauthier v. United States*, No. CIV.A. 4:10-40116, 2011 WL 3902770, at *10 (D. Mass. Sept. 2, 2011) (while the

[6] In support defendant cites *Ryan v. ICE*, which is not an FTCA case and therefore inapplicable. 974 F.3d 9, 26 (1st Cir. 2020).

government may have an internal duty to provide citizens with assistance, private citizens have no corresponding duty "to help others with the investigation and reporting of crimes"). Here, as discussed below, there are clear private person analogues for all the claims. And for false imprisonment, there is a statutory exception to the general bar on intentional torts to allow false imprisonment claims against "law enforcement" officers (but not other federal officers). 28 U.S.C. § 2680. The defendant's reasoning would nullify that provision in the immigration context.

At this stage, defendant has not made a 12(b)(6) motion attacking the substance of plaintiffs' claims. Therefore, there is no need to engage in a substantive analysis of the claims themselves, only that there exist private person analogues for the challenged conduct. But if the states do not have a cause of action *at all*, there is no FTCA claim because no private person could be held liable for the alleged conduct.

The plaintiffs argue that it is premature to determine which law would apply because they represent a national class. *Texas Hill Country Landscaping, Inc. v. Caterpillar, Inc.*, 522 F.Supp.3d 402, 411 (N.D. Ill. 2012). I do not agree. This is a jurisdictional issue, and you must ensure you have subject matter jurisdiction over the named plaintiffs before addressing jurisdictional issues with putative class members. That said, I do not think you need to determine the precise choice of law here if it is at least plausible that a state's law might apply and there is a private person analogue.

In FTCA cases, the action is governed by the substantive tort law of the state in which the tortious act allegedly occurred. 28 U.S.C.A. § 1346(b)(1). From the facts in the complaint, the only possible laws that could apply are D.C., Michigan, and Texas. Texas and D.C. law could conceivably apply to all plaintiffs, but Michigan law could only apply to Family O.

Plaintiffs argue Texas law might not apply and Massachusetts law might apply, but do not explain why. That argument can be dismissed.

iii. State law claims

Tortious Interference with parent-child relationship

Although Texas does not recognize a general "tortious interference with familial relationships" cause of action, *Helena Lab'ys Corp. v. Snyder*, 886 S.W.2d 767, 768 (Tex. 1994); *Hardy v. Mitchell*, 195 S.W.3d 862, 864 (Tex. App. 2006), it does recognize a cause of action when children are abducted from their rightful custodian. *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986). There is some question whether that broader cause of action has been subsumed by a narrower statutory cause of action that applies to "court ordered possessory right[s]" to a child. *In re T.M.P.*, 417 S.W.3d 557, 567 (Tex. App. 2013); *Finley v. May*, No. 07-17-00233-CV, 2017 WL 5763076, at *2 (Tex. App. Nov. 28, 2017). Because *Silcott* has never been overruled, I would not infer it is.

Michigan similarly allows claims for the wrongful abduction of children. *Brown v. Brown*, 338 Mich. 492, 498, 61 N.W.2d 656, 659 (1953). So does D.C. *Bennett v. Bennett*, 682 F.2d 1039, 1044 (D.C. Cir. 1982).

Other states have adopted the "interference" nomenclature that the plaintiffs use. *See, e.g.*, *Wyatt v. McDermott*, 283 Va. 685, 699, 725 S.E.2d 555, 562 (2012). However, I think the "abduction" version found in the three relevant jurisdictions applies given that the children were physically taken from their parents. It is not clear children can bring these claims, but because the causes of action are articulated at a pretty general level, that is more of a 12(b)(6) question, which the United States did not bring.

IIED and NIED

Texas allows IIED claims, but not NIED claims. *Twyman v. Twyman*, 855 S.W.2d 619, 621-24 (Tex. 1993).

The Michigan Supreme Court has never recognized nor barred IIED claims. *Eaton Pine Village v. Jackson*, No. 224572, 2002 WL 1360397, at *5-*6 (Mich. Ct. App. June 21, 2002). However, such claims have been common in Michigan lower courts for decades and are de facto accepted. *Id.* at *7. NIED claims are similarly functionally recognized. *Jensen v. Hadden*, No. 351591, 2020 WL 7417497, at *5 (Mich. Ct. App. Dec. 17, 2020).

Both IIED and NIED claims are recognized in D.C. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1260 (D.C. 2016), *as amended* (Dec. 13, 2018) (applying IIED); J*ones v. Howard Univ., Inc.*, 589 A.2d 419, 422-23 (D.C. 1991) (adopting NIED); *see also Sibley v. St. Albans School*, 134 A.3d 789, 797 (D.C. 2016) (applying NIED).

I think it would be premature at this point to dismiss the NIED claims against Family C; even though they cannot apply under Texas law, D.C. law might be applicable.

Loss of Consortium

Texas recognizes children's loss of consortium cases in non-fatal cases. *Reagan v. Vaughn*, 804 S.W.2d 463, 466 (Tex. 1990). It does not recognize loss of consortium claims for parents in non-fatal cases. *Roberts v. Williamson*, 111 S.W.3d 113, 116 (Tex. 2003). Because it styles these as different causes of action, rather than elements of a single cause of action, I think this must be addressed at the 12(b)(1) motion because there is no private person analogue in Texas for the parent's claims.

Michigan recognizes loss of consortium claims for parents and children in non-fatal cases. *Berger v. Weber*, 411 Mich. 1, 13, 303 N.W.2d 424, 425 (1981).

There is no binding precedent from D.C. barring or applying loss of consortium claims to children or parents. However, D.C. Circuit and District Courts have held it does not exist. *Pleasant v. Washington Sand & Gravel Co.*, 262 F.2d 471, 472-73 (D.C. Cir. 1958); *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739, 740-41 (D.D.C 1952). More recent precedent

suggests that, in D.C., the doctrine concerns claims where "the claimed injury is to the marriage itself." *Paxton v. Washington Hosp. Ctr. Corp.*, 991 F. Supp. 2d 29, 32 (D.D.C. 2013) (citation omitted). Indeed, even in fatal cases, "the District of Columbia does not recognize solatium damages in wrongful death causes of action." *Felder v. WMATA*, 174 F. Supp. 3d 524, 529 (D.D.C. 2016) (citation omitted).

Because Michigan recognizes loss of consortium claims for children and parents, Family O's loss of consortium claims can go forward. C.J.'s loss of consortium claim can also go forward, under Texas law. But F.C.'s loss of consortium claim must be dismissed for lack of a private person analogue.

False Arrest / Imprisonment

Texas allows false arrest and false imprisonment claims and other courts have considered those actionable in the immigration context in an FTCA action. *Lopez-Flores v. Ibarra*, 2018 WL 6577955, *1, *3 (S.D. Tex., Mar. 12, 2018).

Michigan recognizes a cause of action for false imprisonment (no one was arrested in Michigan). *Adams v. Nat'l Bank of Detroit*, 444 Mich. 329, 336, 508 N.W.2d 464, 466 n. 10 (1993).

D.C. allows false imprisonment claims. *Doe v. Safeway, Inc.*, 88 A.3d 131, 132 (D.C. 2014). It also allows false arrest claims. *Phillips v. D.C.*, 458 A.2d 722, 725 (D.C. 1983); *see also Jenkins v. D.C.*, 223 A.3d 884, 889-90 (D.C. 2020) (application of false arrest doctrine).

E. "Systemic Torts"

The defendant argues that "systemic torts" are not allowed in FTCA cases and therefore the entire complaint must be dismissed. The cases it cites do not support any doctrine of "systemic torts." It is true that the United States cannot be generally liable under the FTCA; it must be liable for the acts of its employees. But the allegations here (with one exception, discussed below) are against federal officers and officials. This argument should be rejected. That being said, the hearing would be a good time to press the plaintiffs on who exactly they think is responsible for these harms.

F. Other District Courts

A number of district courts have entertained similar claims. Most of them seem to have come down on the side of the plaintiffs. *A.P.F. v. United States*, 492 F. Sup. 3d 989 (D. Ariz. 2020); *C.M. v. United States*, No. 19-cv-05217-PHX-SRB, 2020 WL 1698191 (D. Ariz. Mar. 30, 2020),; *D.J.C.V. v. United States*, No. 20 CIV. 5747 (PAE), 2022 WL 1912254 (S.D.N.Y. June 3, 2022); *Nunez Euceda v. United States*, No. 220CV10793VAPGJSX, 2021 WL 4895748 (C.D. Cal. Apr. 27, 2021); *A.I.I.L. v. Sessions*, No. CV-19-00481-TUC-JCH, 2022 WL 992543 (D. Ariz. Mar. 31, 2022).

They all follow the same pattern. First, they reject the government's argument that there is no private person analogue for these claims, reasoning that IIED, false imprisonment, etc., are

sufficiently similar. I agree with this. They find that the DFE does not apply because the conduct in question is unconstitutional. This is a little easier for the courts in the Ninth Circuit because a Ninth Circuit district court found the family separation policy unconstitutional, discussed above. They also hold that the DCE cannot apply because the officers were following a policy, not a statute or a regulation. The government seems to have learned from its mistakes and advances the—in my opinion not convincing—alternative that they *were* following a statute, the TVPRA.

The government cites one case that goes in the other direction. *Peña Arita v. United States*, 470 F. Supp. 3d 663(S.D. Tex. 2020). That case is distinguishable because the plaintiffs there never argued against the DFE on constitutional grounds. Also, as discussed above, I do not agree with the court's DFE analysis.

IV. Other Torts

The plaintiffs put forward two other theories of liability that are not adequately briefed: assault and battery and negligence.

A. Assault and Battery

Although it's not clear in their complaint (in part because it's so long), plaintiffs clarify in their response brief that their claims for assault and battery arise from agents physically removing K.O.'s hands from her daughter, L.J., pulling K.O.'s hair to wake her up, kicking E.O., Jr. in the back, and vaccinating E.O., Jr. unnecessarily.

The defendant tries to recast this as a "conditions of confinement" action, which it plainly is not. However, it also does not flow from the separation of the families the way the other torts do.

My inclination is to say that, at this stage, it would be inappropriate to dismiss these claims. Assault claims of this type are at least plausible under the FTCA when done by law enforcement officers, there are private person analogues in every state and the defendant has not shown why the DFE or the DCE should apply.

B. Negligence and Negligent Supervision

In the introduction of their complaint, plaintiffs claim the United States is liable under "the torts of intentional and negligent infliction of emotional distress, *negligence*, false imprisonment, false arrest, assault and battery, and for the loss of consortium." (Am. Comp. ¶ 8) (emphasis added). In their counts they swap out negligence for negligent supervision. In their briefing, they seem to assume they have brought both "direct and indirect" claims of negligence. However, in the plaintiffs' discussion of "direct negligence," they cite cases and doctrines about a duty to protect plaintiffs from third parties, not direct negligence.

Insofar as the supervision claim is derivative of their assault and battery claims, I think that's fine. But the plaintiffs also claim that the defendant:

> negligently supervised the CBP Agents, ICE Agents, and ORR Personnel when Defendant knew or should have known that failure to appropriately supervise the CBP Agents, ICE Agents, and ORR Personnel in their performance of their duties or intervene to *stop the forcible separation of families* described in the preceding paragraphs would likely result in harm and damages.

(Am. Comp. ¶ 237). This borders on the incoherent given the facts alleged. The officers were allegedly *ordered* to separate families—how could the separation be the result of negligent supervision? Even though this is not a 12(b)(6) motion, I think this only makes sense as a general negligence claim against the United States—that the supervisors were negligent in *ordering* the separation. That type of claim is not allowed under the FTCA.

V. Conclusion

This is a complicated case. To summarize:

Transfer

I recommend you do not transfer the case.

Timeliness

Depending on if you think Rule 15 or the "material change" analysis applies to amendment here, you can dismiss the parent's individual claims. I would not grant them equitable tolling.

Discretionary Function Exception

As to Family O, I recommend you find the DFE inapplicable because the government had no authority to detain children when a parent was available.

As to Family C, I recommend you find the DFE inapplicable on constitutional grounds, and perhaps on the grounds that the policy was mandatory for line officers, and perhaps on the grounds it was not susceptible to policy analysis. That said, it is a close case. I do not recommend you find the DFE inapplicable on the grounds that the *Flores* agreement, the TVPRA, or the handbook are binding policies.

Due Care Exception / Private Personal Analogue

If you find the DFE inapplicable, I recommend you find the DCE inapplicable and find that there are private person analogues.

The Hearing

I recommend you focus the hearing on the DFE because that's really what this case turns on.

One final note. If you could remind both parties that you are in the First Circuit and citing dozens of out-of-circuit cases when there is on-point First Circuit law is not helpful, I would greatly appreciate it. Both parties spent a ton of their briefs citing law from favorable jurisdictions rather than the First Circuit, presumably because First Circuit doctrine is more "down the middle." Of course, the District Court opinions that decided identical issues were helpful, and there are some issues, like the constitutionality of the policy, that are addressed in depth by out-of-circuit courts. But for a lot of the nuts-and-bolts doctrine they just didn't cite First Circuit cases. As a result, I had to wade through a ton of superfluous case law. If this case goes forward, it is going to be complicated and it is not helpful when the parties do not brief the relevant law.

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Below is a slightly excerpted version of a memo I wrote addressing possible litigation directed at the Pennsylvania Senate's subpoenas and investigation of alleged irregularities in the 2020 election. I have omitted Section II, which discussed various causes of actions and when and against whom they could be brought; the memo proceeds on the assumption that we would only bring claims under 52 U.S.C. § 10101(b) (usually referred to as "§ 11(b)" of the VRA) against the Senator and Senate Secretary who signed the subpoena and the vendor they hire to conduct the audit. I also omitted the recommendations section. The memo was written in October, 2020; since then, a vendor has been hired and the subpoena has been allowed, but the memo has not been updated.

WRITING SAMPLE

A suit challenging the pending "audit" in Pennsylvania would highlight the danger such audits pose to democracy. However, a suit now would have to overcome standing, ripeness, sovereign immunity, legislative immunity, and abstention, muddying the litigation. These non-merits issues diminish significantly once a third-party vendor is hired.

I. Factual Background[1]

After the 2020 election, all but four counties in Pennsylvania conducted "risk-limiting audits" that confirmed the results of the election; similarly, in May and June the House and Senate published reports confirming the results. After public pressure from former President Trump, on September 15 Pennsylvania Senator Chris Dush, chairman of the Intergovernmental Affairs Committee ("IOC"), held a hearing to authorize subpoenas of voter information and election infrastructure information, describing the investigation as one "into the 2020 general election and 2021 primary election and how the election code is working after the sweeping changes of Act 77 of 2020." However, at the hearing, Dush admitted the investigation's purpose was to "verify the identity of individuals and their place of residence and their eligibility to vote." Dush said the information requested would be reviewed by a third-party vendor he refused to identify. The committee voted to authorize the subpoena on a party line vote.

The subpoena was signed by Dush and Senate Secretary Martin[2] and served on the Secretary of State on September 15, 2021. It requests information on every registered voter in Pennsylvania, including names, addresses, dates of birth, voting history, driver's license numbers, and partial Social Security numbers, as well as election administration information from the Pennsylvania Department of State.

[1] Except where indicated, this information is gathered from the AG's complaint.
[2] Martin is the "is the chief legislative officer of the Senate . . . overseeing numerous financial and administrative functions related to her operation." Office of the Secretary Pennsylvania State Senate, *Secretary & Parliamentarian of the PA Senate*, https://www.secretary.pasen.gov/bio.cfm (accessed Oct. 18, 2021).

According to the Pennsylvania statute, the election commission must create a "public information list" of voter information, including "the name, address, date of birth and voting history" of each "registered elector." 25 PA. CONS. STAT. § 1404(a). Any registered voter can request a public information list, but "may not use any information contained in it for purposes unrelated to elections, political activities or law enforcement." *Id.* at § 1404(c). Regulations require any voter who asks for the list affirm in writing they will not use it for "purposes unrelated to elections, political activities or law enforcement," 4 PA. CODE § 183.14 (b)(5), and may not publish it on the internet, *id.* at (k). Finally, voters may not inspect signatures, driver's license numbers, social security numbers, addresses of certain state employees,[3] *id.* at (c)(4), those who have requested confidentiality due to safety concerns, *id.* at (c)(5), and the "Deceased Voters List," *id.* at (c)(6).

The subpoena requested the information by October 1, but the Pennsylvania executive branch refused to comply. On September 17, Senate Democrats sued Corman, Dush, and Martin to quash the subpoena in state court, arguing it violates separation of powers and disclosure law. On September 23, the Pennsylvania Attorney General sued Dush, Corman, and the IOC, arguing the subpoena violates various state laws and constitutional provisions (including by intimidating voters). On October 4, the ACLU of Pennsylvania filed a motion to intervene in the AG's suit, arguing the subpoena violates privacy rights.

The litigation is being heard in the Commonwealth Court and Dush has not tried to hold the Secretary in contempt.

II. We can either bring § 11(b) claims against Dush and Martin now in an "early suit" or against Dush, Martin and the vendor in a "late suit"

[Discussion of § 11(b) and the pros and cons of other causes of action are omitted.]

[3] Such as police officers, prosecutors, judges.

III. Standing and ripeness challenges are surmountable, but not frivolous.

Because the Pennsylvania executive branch[4] has refused to comply with the subpoena and the harms are arguably "generalized" defendants can raise non-frivolous but relatively weak standing challenges to an early suit. Defendants are on firmer ground in raising ripeness challenges to an early suit because state law litigation might moot our litigation. A late suit is on substantially firmer grounds in both cases.

A. The defendant's standing arguments in an early suit are not strong: this is not a pre-enforcement action and subpoenas can be challenged before investigations begin, and in both suits the harm is not generalized.[5]

In an early suit, defendants might argue that this is a "pre-enforcement" action because we are challenging the audit before it has begun. But the legislature has not passed an allegedly unlawful statute which may or may not be enforced. *See, e.g.*, *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). Instead, the legislature's actions are already intimidating voters. The IOC's subpoena has already been issued, and they have said they *will* give the information to an unknown third party to engage in what is functionally law enforcement activity.

In an early suit, defendants might argue there are too many hypothetical steps for that harm to become real: the state courts must not quash the subpoena, the executive must give them the information, the IOC must find a third-party contractor, etc. *See Clapper v. Amnesty Int'l*, 568 U.S. 398, 410 (2013) (rejecting the claimed harm as too attenuated when multiple hypothetical superseding events are required for the harm to occur); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1993) (holding the harm must be "actual or imminent, not conjectural or hypothetical" in the "injury in fact" analysis). But there is no question subpoenas

[4] Some news reports refer to Governor Wolf as "ignoring" the subpoena; my understanding is the subpoena is not issued to *him* at all, but perhaps he has ordered the Secretary of State to ignore it.
[5] Given our organization's familiarity with them, I omit discussion of the doctrines of individual, associational, and organizational standing.

issued by an Attorney General prior to an investigation can be challenged without waiting for the actual investigation to occur. *See, e.g.*, *Matter of Evergreen Ass'n, Inc. v. Schneiderman*, 153 A.D.3d 87, 101–03 (N.Y. App. Div. 2017) (narrowing the scope of a subpoena because of constitutional concerns). The same reasoning applies here. Both "timing" arguments are inapplicable to a late suit, where the subpoena is legal and a vendor has been hired.

But regardless of whether the suit is late or early, defendants might argue that this is a "generalized" grievance because they are requesting information on every voter. Our response would be that certain classes of voters are reasonably more intimidated by this action and that organizational plaintiffs that serve those classes of voter are uniquely burdened.

B. Ripeness challenges are stronger for an early suit, but surmountable; they are inapplicable to a late suit.

The Third Circuit uses a three-factor test to determine ripeness: whether the parties are "sufficiently adversarial," the appellants "genuinely aggrieved," and the issues appropriately "crystallized." *In re Energy Future Holdings Corp*, 949 F.3d 806, 816 (3d Cir. 2020). All three factors are met in either suit, but an early suit would at least allow the defendants to raise colorable claims.

In an early suit, the first factor is met, as we would take "conflicting positions" on the relevant legal issues from the defendants. *Id.* It is not clear how the second factor is distinct from the "injury in fact" analysis discussed above. *See id.* (holding that suffering from mesothelioma satisfied this factor); *Jie Fang v. ICE*, 935 F.3d 172, 186 (3d Cir. 2019) (holding that being denied lawful status satisfied this factor).

Instead, the analysis would hinge on whether the factual issues were "crystalized"; whether "the facts of the case [are] sufficiently developed to provide the court with enough information on which to decide the matter conclusively." *Id.* Similarly, a Third Circuit panel held

that a dispute is not ripe if it "rests upon contingent future events that may not occur as anticipated." *Sherwin-Williams Co. v. County of Delaware*, 968 F.3d 264, 272 (3d Cir. 2020).

In an early suit the defendants will argue the harm is dependent on future contingencies. However, if the harm is giving the information to a private party to conduct a law enforcement action, there are no future factual matters necessary to "decide the matter conclusively." Unlike in cases where the government has announced certain conduct to be unlawful, but not taken any steps to enforce that announcement, the subpoena is part of the "enforcement" challenged. *See Wyatt, Virgin Islands, Inc. v. Virgin Islands*, 385 F.3d 801, 803–04 (3d Cir. 2004).

Furthermore, while the state court litigation *could* render the matter moot,[6] the Third Circuit seems to hold that simultaneous proceedings addressing distinct issues are not sufficient for a defendant to successfully raise a ripeness challenge. *Cf. Jie Fang*, 935 F.3d at 186 (holding that hypothetical parallel administrative proceedings were not grounds to dismiss the case as unripe where they would not decide all the plaintiff's claims, though they might alleviate some of the harms). The possibility that a state court might issue a holding that renders the lawsuit moot is not the same as a claim that relies on the state to take uncertain steps for the harm to occur—instead, the harm is already occurring, and there exists some possibility a state court might alleviate it. Ripeness concerns would not be applicable to a late suit at all: the investigation would be underway.

IV. State sovereign immunity is not abrogated by § 11(b), but *Ex parte Young* applies.

[6] Furthermore, the state court could rule narrowly that the subpoena exceeds the authority of the committee, in which case a majority vote in the Senate could fix that procedural defect, or they could hold that this is a violation of state separation of powers, in which case the matter would be moot absent a state constitutional amendment.

As we would be suing for injunctive relief against Dush and Martin in their official capacities, they might argue the suit is barred by state sovereign immunity.[7] Arguing that § 11(b) abrogates state sovereign immunity involves complicated arguments about the power it was passed under and would likely fail. However, both Dush and Martin can be enjoined from pursuing the subpoena or sharing information with third parties under *Ex parte Young*, even though there are limits to that doctrine as applied to legislators.

A. Regardless of the power § 11(b) is passed under, it does not "unequivocally" abrogate state sovereign immunity.

Laws passed under the Elections Clause of Article I, § 4 almost certainly cannot abrogate state sovereign immunity, while those passed under § 2 of the Fifteenth Amendment almost certainly can. Whether § 11(b) is an exercise of the Elections Clause or the Fifteenth Amendment is a close case. But even if § 11(b) is a valid exercise of the Fifteenth Amendment, any court looking closely at the matter would find Congress did not unequivocally abrogate state sovereign immunity. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

i. Laws passed under the Elections Clause cannot abrogate state sovereign immunity, but laws passed under the Fifteenth Amendment can.

It is reasonably settled that no power in Article I may abrogate state sovereign immunity. The Supreme Court reasoned in *Seminole Tribe v. Florida* that Article I powers were granted prior to the Eleventh Amendment and therefore the conception of Article III jurisdiction created (or restored) by the Eleventh Amendment governs causes of action created under Article I powers, barring those suits against states without states' consent. 517 U.S. 44, 65–66 (1996) (holding Article I cannot disturb the "balance between state and federal power achieved by Article III and the Eleventh Amendment."). *Seminole Tribe* only dealt with the Commerce

[7] A suit against the private actors would not be barred, and relief would be available.

Clauses. *Id.* at 59–73. However, the reasoning has been extended to the power to enforce patents, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 2199 527 U.S. 627, and copyright law, *Aaron v. Cooper*, 140 S. Ct. 994 (2020). And *Seminole Tribe* overruled the one instance the Court held Congress could abrogate state sovereign immunity under Article I. 517 U.S. at 59–73 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

However, Congress may abrogate state sovereign immunity when acting under the § 5 enforcement power of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."). The Fifteenth Amendment should also allow Congress to abrogate sovereign immunity—just as the Fourteenth Amendment postdated the Eleventh Amendment and gave power to the federal government at the expense of the states, so did the Fifteenth. This is the position of the Sixth Circuit, *Mixon v. State of Ohio*, 193 F.3d 389, 397–99 (6th Cir. 1999), and the Fifth Circuit. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017). The Eleventh Circuit recently followed *Mixon*, but was reversed on mootness grounds. *Alabama State Conference of the NAACP v. Alabama*, 949 F.3d 647, 654–55 (11th Cir. 2020), *judgment vacated as moot*, *Alabama v. Alabama State Conference of NAACP*, 141 S. Ct. 2618 (2021). Unless the Court reverses *Fitzpatrick*, the reasoning of that case applies and the Fifteenth Amendment must give Congress the power to abrogate sovereign immunity.

ii. Assuming § 11(b) is a valid exercise of the Fifteenth Amendment, it did not unequivocally abrogate state sovereign immunity.

To abrogate state sovereign immunity, (1) Congress must make its intent to abrogate "unequivocal" and (2) exercise a power on which abrogation can be based. *Garrett*, 531 U.S. at 363. While it is not clear what power § 11(b) was passed under, it fails the first prong.

Assuming § 11(b) is a valid exercise of the Enforcement Clause of Fifteenth Amendment,[8] it will be difficult to show that Congress "unequivocally" intended to abrogate state sovereign immunity. Unlike § 11(b), Section 2 of the VRA mentions states and whether that is an "unequivocal" abrogation of sovereign immunity is controversial.[9] Instead, Section 11(b) only covers persons acting under "color of law." The Supreme Court held the reference to "color of law" in § 1983 does not apply to states or state actors acting in their official capacities, a position that would likely be extended to § 11(b). *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65–71 (1989). Our best argument would be to tie § 11(b) to the sections of the VRA that mention states and show they were *all* intended to work against the states. Given the availability of *Ex parte Young*, that is not an argument worth making.

B. These legislators and legislative officials are proper defendants under *Ex parte Young*.

Normally, the lack of abrogation is a non-issue when prospective, injunctive relief is demanded because *Ex parte Young* allows federal laws to be enforced against state officials in their official capacity. However, there is little case law on using *Ex parte Young* against legislators who use non-legislative powers. Recent cases involving legislators that block constituents on social media and older case law shows a path forward and strongly suggests both Dush and Martin can be enjoined.

A claim for injunctive relief under *Ex parte Young* requires the targeted official(s) to have a duty to enforce the law. 209 U.S. 123, 157 (1908). This does not mean the law must

[8] *Contra*, Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, N.Y.U. REV. L. & SOC. CHANGE 173, 209 (2015) (arguing § 11(b) should be upheld as an exercise of the Elections Clause power because it does not require the intimidation to be racially motivated).
[9] *See Alabama State Conference*, 949 F.3d at 650–54 (holding the reference to "states" in Section 2 fulfills the requirement of a "clear statement" for abrogation); *contra Lewis v. Bentley*, 2:16-CV-690-RDP, 2017 WL 432464, *9–*10 (N.D. Ala. Feb. 1, 2017) (applying a stringent clear statement test to find the same language in Section 2 "ambiguous").

specifically require the official to enforce it, but that the official "has some connection with the enforcement of the act." *Id.* Therefore, *Ex parte Young* injunctive relief is not available against state legislators who enact allegedly unconstitutional legislation. *See, e.g.*, *Hall v. Louisiana*, 974 F. Supp. 2d 944, 954 (M.D. La. 2013) ("it cannot be said that . . . that the Legislature has some connection with the enforcement of the 1993 Judicial Election Plan; or that they are specifically charged with the duty to enforce the Plan and are threatening to exercise that duty.").

However, legislators are not immune from injunctive relief. For instance, in *Bond v. Floyd*, the Supreme Court concluded without analysis that it had jurisdiction over a suit concerning the refusal of the Georgia House of Representatives to seat a member. 385 U.S. 116, 131 (1966). After the Second Circuit ruled that it was unconstitutional for Trump to block critics on his Twitter account, *Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2019), *vacated as moot by Biden v. Knight First Amendment Inst.* 141 S. Ct. 1220 (2020), similar suits were instituted against other politicians. As in *Bond*, most of the Courts hearing cases against legislators simply assumed injunctive relief was available. *See, e.g.*, *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021). Of the two courts to consider the question, one engaged in a cursory analysis concluding that the operative question was whether the legislator was acting in an official capacity. *Clark v. Kolkhorst*, No. A-19-CV-00198-LY-SH, 2020 WL 6151570, *6–*7 (W.D. Tex. Oct. 20, 2020). The other court to consider the question held that the focus on enforcement was misguided, and that "any act by a state official—as long as it is performed under color of state law—is sufficient." *Attwood v. Clemons*, 818 F. App'x 863, 868 (11th Cir. 2020). Instead, injunctive relief is available if the violation by the state official is ongoing, and the relief is prospective. *Id.* at 867–68 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Maryland*, 525 U.S. 635, 645 (2002)).

Normally, legislators are poor targets because they cannot offer prospective relief—a Court will not order them to repeal legislation. However, the violation here is ongoing and the prospective relief is clear whether the suit is late or early: declaring the subpoena unlawful or ordering the IOC to not share information with a vendor. Furthermore, using the language of "enforcement" from *Ex parte Young*, the officials are enforcing these actions: Dush is enforcing the subpoena by defending it in court and would presumably transfer the records to the vendor himself. The subpoena is signed by Dush and Martin in their official capacities. *Ex parte Young* should apply and state sovereign immunity should not be a bar to relief for early or late suits.

V. The subpoena, sharing the information with a third-party vendor, and conducting an audit are not protected by legislative immunity.

Whereas federal legislative immunity is derived from the Speech and Debate Clause, the Supreme Court has held a roughly coterminous non-constitutional immunity applies via federal common law to state legislators and immunizes them from damages and injunctive relief. *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732–33 (1980).[10] Dush and Martin[11] will argue that issuing a subpoena is covered by this immunity. Rather than arguing that § 11(b) abrogates state legislative immunity, [12] our strongest argument for a late or early suit is that the subpoena, sharing the information, and the audit are all non-legislative enforcement actions not

[10] Lower courts have occasionally made distinctions between the scope of the two immunities, despite the language in *Consumers Union* that they are identical. *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015) ("the need to protect legislative independence and the legislative process for state legislators may be somewhat tempered when federal statutory law comes into conflict with federal common law").
[11] In Eastland v. U.S. Serviceman's Fund, the Court held that Congressional legislative counsel was afforded full legislative immunity. 421 U.S. 491, 507 (1975); *cf.* Gravel v. United States, 408 U.S. 606, 616–22 (1973) (holding that legislative aides are also covered by legislative immunity so long as they are participating in legitimate legislative acts). If the act is a legitimate legislative act, Martin is protected by legislative immunity.
[12] Although most of the cases involving legislative immunity concern § 1983, and § 1983 has been interpreted to contain immunities not available in other contexts (for instance, qualified immunity is inapplicable to Title IX claims), courts have generally assumed legislative immunity applies to all causes of action. *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 797 (W.D. Wis. 2020) (holding that all "claims [brought here] against [legislators] are foreclosed by the doctrine of legislative immunity," including ones based on the VRA).

covered by legislative immunity. A late suit might raise practical difficulties, but also allow for alternate arguments.

A. The Supreme Court considers using subpoenas for enforcement actions and fishing expeditions to be outside the scope of legislative power.

Generally, the Supreme Court holds that legislative subpoenas and investigations are protected by legislative immunity as legitimate legislative acts. *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 504–05 (1975). However, subpoenas must concern legitimate legislative activity. *Trump v. Mazars, USA LLP*, 140 S. Ct. 2019, 2031–32 (2020) ("The subpoena must . . . concern a subject on which legislation could be had.") (cleaned up). There is no consistent test, but there are two rough, overlapping areas in which subpoenas are considered non-legislative: if they are functionally an enforcement action or if they constitute a standardless "fishing expedition." *See id.* at 2048 (Alito, J., dissenting) (noting evidence the subpoena of Trump was a de facto "enforcement" action and that the sheer volume requested was disturbing).

Recently, the Supreme Court held that the Congressional power to subpoena did not extend to "law enforcement," a "'general' power to inquire into private affairs and compel disclosures," "to expose for the sake of exposure," or to conduct investigations for "personal aggrandizement of the investigators or to 'punish' those investigated." *Id.* at 2032 (cleaned up) (majority opinion). However, there is no clear test for determining when legislative investigations veer into enforcement. In *Tenney v. Brandhove*, the Court held, "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." 341 U.S. 367, 378 (1951) (discussing a state legislature). There is no binding precedent where legislative activity was deemed non-legislative on the grounds it was an enforcement action, nor one where the distinction was even discussed at length. However, motive inquiries are not part of

the analysis and "impure" motives cannot render an otherwise legal subpoena illegal. *See e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Eastland*, 421 U.S. at 500; *Watkins v. United States*, 354 U.S. 178, 200 (1957) *Tenney*, 341 U.S. at 377; *but see Mazars*, 140 S. Ct. at 2035 (never mentioning motive inquiries).

Alternately, the Supreme Court has suggested that the aims of legislative subpoenas must be defined with some degree of specificity, and there must be some sort of nexus between the subpoena and the stated aim. Analyzing the "aims" issue, while reviewing a contempt conviction of a witness who refused to identify certain supposed communists after being subpoenaed by the "House Committee on Un-American Activities," the Court in *Watkins* was highly critical of the breadth of the authorization given to the committee by the House, 354 U.S. at 201–02, and the lack of oversight exercised by the House, *id.* at 203–04; *but see Eastland*, 421 U.S. at 507 (holding subpoenas as an investigation of the "administration, operation, and enforcement of the Internal Security Act of 1950" were sufficiently narrow). Analyzing the "nexus" issue, the *Watkins* Court was skeptical of the nexus between the aim of the hearing (communism in labor organizations) and the questioning because most of the individuals the committee asked the witness to identify had nothing to do with labor organizations. 354 U.S. at 213–14. Similarly, in *Mazars* the Court held that "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose . . . That is *particularly true* when Congress contemplates legislation that raises sensitive constitutional issues." 140 S. Ct. at 2035 (emphasis added). Although *Mazars* dealt with federal separation of powers, the emphasized language shows that it is a general command to analyze whether a subpoena advances a legislative purpose.

B. Under Third Circuit precedent, the investigation is outside the scope of Congressional power, and thus outside the scope of state legislative immunity, and declaring it unlawful will not undermine the purposes of legislative immunity.

In determining if legislative immunity applies to a state official, the Third Circuit determines (1) whether the power exercised is analogous to one granted to Congress and (2) if review of the action would undermine the purposes of legislative immunity, which are ensuring (A) non-interference from other branches and (B) lawmaking without fear of suit. We would argue that the subpoena and the audit are parts of an unlawful enforcement action, the subpoena is overbroad, and in both cases judicial review would not undermine the purposes of legislative immunity. Despite being on firmer legal ground, the overbreadth argument is weaker as a practical matter because the IOC or the legislature can reissue the subpoena under different rules.

i. Legislative Immunity in the Third Circuit[13]

In *Larsen v. Senate of Pa.*, the Third Circuit considered a challenge by a former state supreme court justice to an impeachment proceeding. 152 F.3d 240, 243 (3d Cir. 1998). First, it held that because the U.S. Constitution gives the Senate the power of trying impeachments of judges, the Pennsylvania Senate's parallel power to do so was a legitimate legislative activity under federal common law. *Id.* at 250–52. However, it also held that "[l]egislative immunity must be applied pragmatically, and not by labels . . . we examine whether [relief] could be accorded consistent with the policies underlying legislative immunity." *Id.* at 253. Those policies are "legislative independence" from other branches and to allow legislators to do their job without the worry of lawsuits. *Id.* at 249–50. The panel held that legislative immunity applied because the relief would force "the individual Senators [to] rescind their guilty vote . . . directly

[13] The Third Circuit has an inapplicable test for separating "administrative" and "legislative" acts. *See, e.g.*, Ryan v. Burlington County, 889 F.2d 1286, 1290–91 (3d Cir. 1989); Larsen v. Senate of Pa., 152 F.3d 240, 252 (3d Cir. 1998) (when there is no question as to whether the act is "administrative" or legislative, the test is not applicable).

interfere[ing] with the role assigned exclusively to the Senators by the Pennsylvania Constitution" and require "extensive discovery . . . into the motives for the Senators' votes" *Id.* at 254. Thus, allowing the suit would force the judiciary to interfere with the legislative branch and prevent effective lawmaking by requiring discovery into their motivations.

ii. This is a non-legislative enforcement action

We could argue this is a "law enforcement" action instigated for "personal aggrandizement of the investigators [and] to 'punish' those investigated." *Mazars*, 140 S. Ct. at 2032 (cleaned up). However, lack of clear precedent is an issue; we would mostly be arguing from first principles.

If this is a functional law enforcement action, it is outside the power of the Senate and therefore outside the scope of state legislative immunity in federal court. This investigation's stated goal is to uncover supposed fraud in the 2020 election. Investigating fraud and other election crimes is the province of the executive branch. The legislature can subpoena the executive branch to learn details of investigations or to determine whether it has been investigating crimes, but they cannot instigate those investigations themselves.

Nor would ruling the subpoena or audit unlawful undermine the purposes of legislative immunity. Litigating its lawfulness does not intrude on the independence of the legislature—they do not need to rescind votes as a result. Nor does it interfere with the ability of legislators to pass legislation because the suit would not consider the motives of legislators. Instead, both the sheer volume of the information requested as well as the stated goals of Dush (uncover fraud) show this is a de facto enforcement proceeding. *Cf. Mazars*, 140 S. Ct. at 2048 (Alito, J., dissenting).

However, due to the lack of precedent, we would be relying heavily on *Mazars*, and we would be asking a court to strike out into unknown territory. A court could reasonably hold that

subpoenas are legitimate legislative activity and our framing of the subpoena as an investigation is really an inquiry into motive barred by the legislative immunity doctrine.

iii. The investigation is lacks a sufficient nexus with the stated aim of uncovering fraud.

Although we could argue that the subpoena was not validly authorized,[14] that would largely duplicate state court litigation and offer the Senate an easy solution: formally authorize the investigation. Instead, a better argument is that the investigation lacks a sufficient nexus between the stated aim of the investigation and the subpoena issued.

Because subpoenas that lack a sufficient nexus to the stated aims of the investigation are outside Congressional power, if this subpoena lacks a sufficient nexus it is outside the federal common law's definition of legislative power. The stated goal of the subpoena is investigating Act 77's effect on the 2020 election; the request is giving the private voting information of every registered voter in Pennsylvania to an unknown private company. That may well "lead to ruthless exposure of private lives in order to gather data that is neither desired by the [legislature] nor useful to it." *Watkins*, 354 U.S. at 204. After all, it is not clear why the county audits nor the House and Senate's independent reports were insufficient to determine whether there was systemic fraud.

And ruling on these grounds would be even less harmful to the purposes of legislative immunity. Insisting on a nexus between legislative investigations and their stated aim is not interfering with the legislative sphere, nor does it impede their ability to pass laws by requiring invasive discovery. The suit would be agnostic as to the motives or even the purpose of the investigation. But it opens us up to the rejoinder that all Dush needs to do is send a more focused

[14] It does not appear the Senate ever voted, as a chamber, to authorize the investigation.

subpoena and legislative immunity will attach. (Or, in a late suit, not send *all* the information to the vendor).

C. Bringing a late suit might make the legislative immunity argument more difficult, but we can try to distinguish legislative immunity as applied to the subpoena from the audit.

In a late suit, a Pennsylvania court will have presumably ruled the subpoena legal under Pennsylvania law. Nothing would technically prevent us from arguing the subpoena and the audit are still unprotected, non-legislative enforcement activity under federal common law at that point. And if we are successful, none of the private parties could raise a legislative immunity either. But a federal court might hesitate to rule that the Pennsylvania judiciary's conception of legislative power is incompatible with the federal common law conception. In that case, we could try to distinguish the subpoena from the audit, but it will be difficult.

Legislators cannot claim legislative immunity when they share information with private parties for publication by private parties. *Gravel v. United States*, 408 U.S. 606, 625–26 (1972). But private parties can claim legislative immunity when they create reports for legislators if the harm from the report comes from "introducing material at Committee hearings," "referring the report . . . to the Speaker of the House," or voting for publicizing the hearings. *Doe v. McMillan*, 412 U.S. 306, 312 (1973). That is, if the harm comes from publicizing the information as part of legislative hearings, it extends to private parties, but if the harm comes from sharing information with private parties, legislative immunity does not attach at all.

As to the vendor, if it is the act of *reviewing* information that is intimidating, *Doe* is inapplicable because the harms do not come from *publication*.[15] Just as a private actor hired by a legislator could not unlawfully obtain information and then raise a legislative immunity defense

[15] Publicizing the information would also be intimidation, but would be protected by legislative immunity if the publication is done on the legislative floor.

if sued, they cannot engage in voter intimidation and claim they are shielded by legislative immunity. A similar theory would apply to state actors: even if the subpoena is a valid legislative act, sharing it with a private party to investigate it for alleged criminal activity is not. However, a court might well balk at the theory that an inter-branch subpoena is lawful, but it is unlawful to *use* the information lawfully collected.

VI. Abstention arguments will not bar an early suit.

Defendants might argue that the parallel state law litigation merits abstention in an early suit. The only two applicable abstention doctrines, *Pullman* abstention and *Colorado River* abstention, are not strong.

Pullman abstention applies when the resolution of the state law issue will dissolve the federal constitutional issue in a case. 312 U.S. 496, 501–02 (1941). That is not applicable here because we would only be suing on federal statutory grounds, not constitutional grounds. *Cf. United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 363–64 (3d Cir. 1986) (holding that preemption claims are not appropriate for *Pullman* abstention); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PROCEDURE AND PRACTICE, § 4242 (1998) (noting that while some courts in the 1960s and early 70s applied *Pullman* abstention to cases involving federal statutory law, the rule is limited to constitutional cases).

Colorado River abstention applies to parallel federal and state litigation where there are "exceptional circumstances" that justify a stay of the case. Whether the cases are "parallel" is a threshold determination in the Third Circuit, and depends on whether there is "substantial similarity in issues and parties." *Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 287 (3d Cir. 2017) (collecting cases). Cases can be quite close and not parallel: the Third Circuit has held that an insurance company seeking a federal declaratory judgment on its obligation to defend and

indemnify those it insures is not parallel with state tort litigation against the same insurance company on the basis of the same incident. *Id.* at 287 (collecting cases). Here, the two cases are not parallel because the parties would be different, and we would not be litigating any state law claims (legislative immunity is a question of federal common law, not state law). However, there are no published cases where that was determinative; instead, when it has rejected abstention arguments, the Third Circuit always has gone on to find the "extraordinary circumstances" factors also do not merit abstention.

The Supreme Court has announced a six-factor test to determine if exceptional circumstances exist, "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S 1, 16 (1983). The first factor is inapplicable—whether either case is an *in rem action*. The second factor, whether a federal forum is inconvenient, is also inapplicable because there is no inconvenience. The third factor, the "avoidance of piecemeal litigation," is not a general command to avoid piecemeal litigation, but "an inquiry into whether avoiding piecemeal litigation is a priority contemplated by the statute, regulation, or other authority at issue." *Nationwide Mutual Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 308 (3d Cir. 2009). Nothing in § 11(b) contemplates a policy one way or another.

When considering the fourth factor, order of litigation, the Third Circuit focuses on "[t]he comparative progress made in the state cases" on the common issues. *Id.* at 809. If the court decided there were common legal issues, there might be some "duplicative judicial effort" in the state and federal proceedings. *Id.* The fifth factor, whether a federal rule controls the merits, weighs against abstention because the merits of the voter intimidation suit are entirely a question of federal law, as is the legislative immunity analysis, to the extent it can be considered part of

the "merits." Finally, if there is concurrent jurisdiction the Third Circuit finds the sixth factor of whether the state court can protect a party's rights to carry "little weight." *Id.* at 308. This factor seems to be a one-way ratchet that is either inapplicable or weighs against abstention. *See Ryan v. Johnson*, 115 F.3d 193, 200 (3d Cir. 1997). Because the VRA does not give the federal courts exclusive jurisdiction, this factor would be inapplicable. Because "the balance [is] heavily weighted in favor of the exercise of jurisdiction," *Cone*, 460 U.S. at 23, and only one factor (four) *could* weigh in favor of abstention, a *Colorado River* argument will fail.

That does not mean an early suit would be heard quickly. The state law litigation could render the matter moot, and a TRO is not likely, given that irreparable harm will be difficult to show where the executive branch is refusing to comply with the subpoena. A late suit would raise no formal or informal abstention issues.

VII. Recommendations

[omitted]

Applicant Details

First Name	**Sophia**
Middle Initial	**H**
Last Name	**Houdaigui**
Citizenship Status	**U. S. Citizen**
Email Address	**shoudaigui@uchicago.edu**
Address	**Address** Street **5454 S Shore Drive** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**2023526832**

Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**April 2021**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Legal Forum**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Huq, Aziz
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Ginsburg, Thomas
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Levmore, Saul
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References

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Aziz Huq
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Tom Ginsburg
Leo Spitz Distinguished Service Professor of International Law
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 25, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, Michigan 48226 United States

Dear Judge Davis,

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024-2025 term. Your career, particularly your time with the U.S. Attorney's Office for the Eastern District of Michigan, is inspiring as a young woman interested in pursuing a career in government service. I was particularly struck by the Detroit Youth Violence Prevention Initiative you spearheaded, as I became interested in youth justice as a research assistant for the Columbia Justice Lab. Beyond this matter, my strong commitment to public service stems from my father's immigration story from Morocco to Northern Virginia. This personal drive coupled with my interest in public policy drove me to co-found Hyphenated America, a civic education platform aimed at making immigration laws and policies easier to understand for students across the country. I see a clerkship with you in Detroit as an unrivaled opportunity to learn from and work with a dedicated public servant.

My professional, academic, and extracurricular experiences have prepared me well for a clerkship with your chambers. As a summer associate in Sidley Austin's New York office, I have already had the opportunity to work on various pro bono projects dedicated to criminal defense work, including advocacy of a Bronx native accused of conspiracy to distribute a controlled substance. Interning in Congress for members on both sides of the political aisle had already solidified my interest in pursuing a long-term career in public service. These experiences would assist me in effectively considering multiple perspectives when reviewing briefs.

Furthermore, I want to leverage my leadership experience as your law clerk. As Managing Editor of the *University of Chicago Legal Forum*, I honed my editorial skills in the production of leading legal scholars' upcoming articles. My student comment, which centers on the domestic terrorism framework, allowed me to engage with substantive research. Additionally, this past year, I served as the Co-President of the University of Chicago's American Constitution Society (ASC) chapter, the law school's largest student organization, serving over two hundred and fifty active members. I was excited to learn of your leadership with the Detroit Chapter Executive Board of ACS.

Please find my resume, writing samples, and law school transcript enclosed. Letters of recommendation from Professors Saul Levmore, Aziz Huq, and Tom Ginsburg will arrive under separate cover. Thank you for your consideration.

Sincerely,
/s/ Sophia Houdaigui
Sophia Houdaigui

Sophia Houdaigui
5454 S. Shore Drive, Chicago, Illinois 60615 | (202) 352-6832 | shoudaigui@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
Juris Doctor, Expected June 2024

- **Honors and Awards:** Recipient of the Anna Weiss Graff Honor Scholarship
- **Activities:** *University of Chicago Legal Forum*, Managing Editor; American Constitution Society, Co-President; Immigrants' Rights Clinic, Student Attorney; Southwest Asian and North Afrikan Law Students Association, Vice President; Law School Musical, Director; Faculty Interview Committee, Student Interviewer; Peer Advisor

Barnard College, Columbia University, New York, NY
Bachelor of Arts in History, April 2021

- **Honors and Awards:** Williams Fellow for Women in Politics, Highest Distinction in Leadership Award
- **Thesis**: *Maghribiin and the Commonwealth: The Moroccan Immigrant Experience in the American South*
- **Activities:** Columbia Political Review, Athena Center Advisory Board, Columbia Musical Theatre Society, Varsity Show

PROFESSIONAL EXPERIENCE AND EMPLOYMENT

Sidley Austin LLP, New York, NY
Summer Associate, May 2023-Present

- Conduct research for clients on a variety of matters including white collar litigation and criminal defense

Department of Justice, Office of Legal Policy, Washington, DC
Intern, May 2022 – August 2022

- Briefed the Assistant Attorney General and prepared memoranda on issues related to national security and firearms
- Coordinated the vetting of candidates for federal judgeships and assisted in the confirmation process with the White House

Hyphenated America, Washington, DC
Co-Founder, April 2020 – January 2022

- Created and managed a civic education platform dedicated to making immigration laws and policies easier to understand
- Featured on *Al Jazeera*; published opinion piece concerning immigration education in *The Chicago Tribune*

Columbia Justice Lab, New York, NY
Research Assistant, April 2021 – August 2021

- Spearheaded a report on the relationship between youth decarceration and regional crime rates

Congressman Will Hurd of Texas-23, Washington DC
Congressional Intern, May 2019 – August 2019

- Researched and wrote memoranda concerning international affairs, national security, and immigration
- Drafted opinion pieces for Rep. Hurd published in *The Wall Street Journal*, *The Washington Post*, and *USA Today*

Guidepost Solutions, Washington, DC
Intern, May 2018 – July 2018

- Performed research for clients concerning issues related to immigration and cryptocurrency, while monitoring use of their proprietary identity SecureID program utilized by private companies

Senator Tim Kaine, Washington, DC
Congressional Intern, April 2017 – June 2017

- Conducted legislative research; assisted staff with drafting memoranda; performed administrative tasks

Brooklyn Bagel Bakery, Arlington, VA
Cashier, Barista, and Social Media Coordinator, June 2015 – August 2021

- Managed opening and closing of registers, customer service, and maintenance of all social media content

COMMUNITY INVOLVEMENT

Running Start, Washington, DC
Ambassador and Independent Speaker, May 2015 – Present

- Elected as Ambassador in a national competition for Running Start, a nonprofit that trains young women to run for office
- Introduced a consortium before the UN; spoke alongside Senator Daschle; wrote for POLITICO's #WomenRule Newsletter

INTERESTS

- Musical theatre, comedy, reading political autobiographies, conversational Moroccan Arabic, conversational French

THE UNIVERSITY OF CHICAGO

Name: Sophia Hannah Houdaigui
Student ID: 12334998

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Barnard College-Columbia University
New York, New York
Bachelor of Arts 2021

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	173
LAWS	30211	Civil Procedure Emily Buss	4	4	175
LAWS	30611	Torts Saul Levmore	4	4	176
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	173
LAWS	30411	Property Lee Fennell	4	4	173
LAWS	30511	Contracts Eric Posner	4	4	176
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	178
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	173
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	176
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	179
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	177

Summer 2022

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations Anthony Casey	3	3	175
LAWS	46101	Administrative Law Thomas Ginsburg	3	3	178
LAWS	53219	Counterintelligence and Covert Action - Legal and Policy Issues Stephen Cowen Tony Garcia	3	3	178
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	175
LAWS	43282	Energy Law Joshua C. Macey	3	3	177
LAWS Req Designation:	53221	Current Issues in Criminal and National Security Law Meets Writing Project Requirement Michael Scudder	3	3	179
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Date Issued: 06/03/2023

THE UNIVERSITY OF CHICAGO

Name: Sophia Hannah Houdaigui
Student ID: 12334998

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	176
LAWS	43218	Public Choice and Law Saul Levmore	3	3	177
LAWS	53456	Comparative Race, Ethnicity and Constitutional Design Thomas Ginsburg	3	0	
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

End of University of Chicago Law School

Date Issued: 06/03/2023


THE UNIVERSITY OF
CHICAGO

Aziz Huq
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June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Sophia Houdaigui (University of Chicago Class of 2024), to the position of law clerk in your chambers. I know Sophia because I taught her in a 1L elective classon Constitutional Law: Equal Protection and Due Process, and because I have worked with her in her capacity as co-president of the University of Chicago chapter of the American Constitution Society (ACS). Sophia has an extensive background in public service, having worked with a number of elected representatives, and has put together a solid record at the law school: This earned her a place on the University of Chicago Legal Forum, where she gone on to play a leadership role as a managing editor. My own experience working with her on ACS matters suggests to me that she is diligent, thorough, and very professionally capable. She will make a terrific law clerk. And I enthusiastically support her application.

Let me start with academics. As noted above, I taught Sophia in a 1L elective called Constitutional Law: Equal Protection and Due Process. The class (as I teach it) involves a great deal of constitutional and political history; it focuses on the way in which different moments in history have shaped the selection of controversies and the nature of the rules that emerge. Sophia was an active and consistently insightful contributor to the class. She wrote a very respectable exam and obtained a grade that was securely in the middle of the class's distribution. I write complex, issue-intensive exams that demand an ability to read a detailed fact pattern and immediately perceive not just the presence of a legal issue, but also a host of interactions between the legal issue and the facts, and also the several alternative (often outcome dispositive) ways of framing the issue. I identify ex ante 200 distinct points and subpoints that could be raised based on the exam prompts, and then grade students accordingly. This approach means I obtain a dispersion of grades that ensures meaningful distinction. Sophia's exam was well-written and showed a grasp of the relevant law. It did not evince any lack of legal skill, or cause for concern about her legal abilities.

More generally, Sophia was offered a very solid performance across her time so far at the law school. She has obtained good grades in a range of courses ranging from Legal Research and Writing, Administrative Law, and Comparative Legal Institutions. (Where she has fallen short has been in courses that are less law-focused, such as Transactional Lawyering: This mandatory class is very much aimed at students aiming to go into some form of business law, which I understand not to be Sophia's interest or focus. Her pattern of grades supports the conclusion that she would be a strong law clerk, fully equipped to address any of the issues that would come up in a federal chambers.

A little more context is useful to evaluate Sophia's grades, particular in relation to the grades and transcripts of students from peer schools. Unlike those peers, Chicago abjures grade inflation in favor of a very strict curve round a median score of 177 (which is a B in our argot), which is where Sophia's later scores cluster. But there is not large movement from this median and cannot be. Because Chicago grades on a normal distribution, and because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. This is simply not possible with a grading system of the kind used by some of our peer schools. These are seemingly designed to render ambiguous differences between the second tier of students and the third- and fourth-tiers. Students who are in fact Sophia's equals at other institutions are thus hard to distinguish from lower and higher performing students; they can hide variation in their performance, by their transcripts. This is an unfortunate effect of Chicago's effort at clarity and transparency, which tends to disadvantage (comparatively) students such as Sophia.

Beyond her academic work, Sophia has been an active member of the law school community, contributing in many different ways. In particular, she has been an absolute terrific co-president of the school's ACS chapter—indeed, so good that she and her colleague won an award from the national organization for their organizational skills, excitement, and vigor. From my perspective, the award seems more than warranted. Sophia has consistently demonstrated deep organizational capacity, a clear vision, and a deft hand in presenting often-difficult issues for a wide student audience. In addition, Sophia has taken on the labor-intensive and rather thankless role of managing editor at the University of Chicago Legal Forum. Further, she will be putting on and directed next year's law school musical: This is an immensely challenging logistical and artistic task.
.
Sophia has a deep commitment to public service, and I have no doubt that she would use a federal clerkship as a springboard into that kind of career. This comes from growing up in a household with a Muslim migrant father (who arrived in the United States, basically building a successful business from scratch) and a Jewish lawyer mother (who has longed worked on immigration issues). She has consistently worked in the family business since high school. During college, Sophia interned for both Democratic Senator Tim Kaine of Virginia and Republican Congressman Will Hurd of Texas, working on difficult and

contentious issues such as immigration—and often ghostwriting for her bosses (for publication in places such as the Wall Street Journal and the Washington Post). She has also worked closely with Running Start, an organization that encourages young women to run for public office. At Barnard, moreover, she founded Hyphenated America, a civic education platform committed to making immigration laws and policies easier to understand.

During law school, Sophia has worked consistently and carefully to advance her public service career. Last summer, she interned at the Justice Department's Office of Legal Policy. There, she collaborated with the U.S. Attorney's Office for the Southern District of New York, as well as professionals at the Department of Homeland Security, on a range of policy and regulatory tasks. She also helped with the vetting process of candidates for federal judgeships and their confirmation with the White House.

Based on all this evidence, I have every expectation that Sophia will be a very good law clerk. I am thus a very keen supporter of her application, and very much hope you consider it seriously. I would be happy to answer any questions you have about her candidacy and can be reached at your disposal at huq@uchicago.edu or 703 702 9566.

Sincerely,

Aziz Huq

Frank and Bernice J. Greenberg Professor of Law

Professor Tom Ginsburg
Faculty Director, Malyi Center for the Study of Institutional and Legal Integrity, Leo Spitz Distinguished Service Professor of International Law, Ludwig and Hilde Wolf Research Scholar, Professor of Political Science
The University of Chicago Law School
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June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

It is my pleasure to recommend Sophia Houdaigui, a member of the class of 2024, for a clerkship in your chambers. Sophia is a very strong candidate. She is a very bright and engaging person, a strong lawyer and good writer, and I recommend her very highly.

I first met Sophia during the Spring Quarter of her 1L year when she enrolled in my elective course in Comparative Legal Institutions. This course is designed to encourage thinking about law from a broad interdisciplinary perspective. In particular, it looks at law across time and space, integrating literatures from political science and economics along with more conventional legal materials. We survey, among other legal systems, those of imperial China and classical Islam, focusing on judicial institutions and their core structures. Sophia was an enthusiastic class participant who always added value to the class discussion, and demonstrated the ability to think creatively in dealing with novel material. She wrote one of the stronger exams in the class, finishing in roughly the top quintile.

In the Fall of 2022, Sophia enrolled as a student in my course in Administrative Law, which is of course a field in significant flux. She was an excellent addition to the class, reflecting her abiding interest in public service. She was an engaged and constructive participant in classroom discussions, whose interventions were always helpful in moving the class forward. She demonstrated a deep understanding of the material, and her serious commitment made the class much better. Sophia's exam was above the median in the class of 60 students, which as a group was among the best I have ever taught.

This last quarter, she was in a seminar I taught on Comparative Race, Ethnicity and Constitutional Design. We were looking at alternative models of racial difference in different societies, with each student focusing on a particular country. Sophia chose Morocco, where her father was born as a member of the minority Berber community. She was just a wonderful participant in the class, and navigated sensitive material with delicacy and skill. Her paper is due at the end of the Summer Quarter so I do not yet have a grade for her, but she is a fine writer and I expect her to do well.

I have also worked with Sophia as a staff person on the *Legal Forum,* in my capacity as advisor to the journals. She is a beloved member of the community who gets along with others. I have also worked with her in her role with the American Constitution Society. There, she helped organize a joint event with the Federalist Society on the Ukraine invasion, in which I was a participant. She embodies the willingness to engage in dialogue across difference, which we value so much here at Chicago. For Sophia, this engagement is the core of who she is: able to hold multiple perspectives at once and eager to discuss them.

Sophia is committed to public service, particularly focusing on immigration law at this point. She has the background in administrative law needed to navigate this area, and I am sure will have a wonderful career. You will also find Sophia to be an excellent person to mentor and to work with. She will soak up ideas, and turn around assignments quickly and with great skill. She will get along with everyone in chambers.

The bottom line is that Sophia Houdaigui is simply an excellent law student, who will be a smart, hardworking, and focused clerk, as well as a superb leader thereafter. I recommend her very highly and urge you to interview her. You will not be disappointed.

Please do not hesitate to contact me for further information or detail.

Sincerely,
Tom Ginsburg

Professor Saul Levmore
William B. Graham Distinguished Service Professor of Law
The University of Chicago Law School
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Chicago, IL 60637
s-levmore@uchicago.edu | *773-702-9590*

June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

Sophia Houdaigui has told me of her interest in clerking for you. She is an extremely likeable and hardworking applicant who just might be the most popular person in our law school – with great insight into people and, from a professor's point of view, excellent insight into political views and the impact of law on people's lives. She will quickly become the best friend of her co-clerks, and she will bring out the best in them and the best in any team. She's a natural leader, and yet is eager to please professors and, I presume, supervisors and judges.

Sophia is a curious blend of politics and pragmatism. On the one hand, she has not met a liberal organization or cause that she does not want to champion with energy and optimism and, on the other hand, perhaps because her father owns a bagel store, she is quite sensitive to the impact of liberal politics, law, and especially criminal law on actual people who are trying to make a business flourish.

She has grown a great deal in her first two years at the University of Chicago. As you will see from her grades, she started out by memorizing the facts of cases and doing poorly on exams. And then, by her second year, she figured out what law is about and what she is here to learn. Her grades rose by leaps even as she managed organizations and brought in speakers – while getting her classmates of varying political inclinations to talk, to sponsor these speakers together, and to learn from one another.

She is also about as personable and quick as one can get. Her prior experience in acting and comedy is apparent (though she sometimes hides this skill appropriately). If you say something ironic or subtle, she will be the first in your chambers to discern the humor. I suspect she is a real catch and certainly someone to meet.

Sincerely,
Saul Levmore

Sophia Houdaigui
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Writing Sample

I prepared the attached writing sample for my Current Issues in Criminal and National Security Law course at the University of Chicago Law School. In this assignment, I was asked to prepare a majority and dissenting opinion on a fictional *Quarles* claim in the Supreme Court. To create a 10-page writing sample, I omitted the information regarding *Quarles* and *Miranda* and the facts section which details the following distinct questions. The first concerns the applicability of the public safety exception articulated in *New York v. Quarles* to terrorism-related attacks. *New York v. Quarles*, 467 U.S. 649 (1984). The second regards the scope of the "joint venture" doctrine. At 12:12 pm EST on April 1, 2021, a pipe bomb detonated in Washington, DC. As a result of the explosion, five individuals were killed and approximately fifteen were injured. The fictional petitioner, Nawaf al-Hazimi, was arrested in connection with the attack in the Republic of South Susan. On an American plane, a team of FBI officials interviewed al-Hazimi for fourteen hours without reading him the *Miranda* warnings. al-Hazimi argues that the District Court and Court of Appeals erred in denying his motion to suppress his statements to the FBI team aboard the American aircraft. He principally challenges on the public safety exception and the "joint venture" doctrine.

JUSTICE GORSUCH delivered the opinion of the Court.

I.

We start by considering the first *Miranda* issue at hand. As previously described, a team of FBI investigators questioned al-Hazimi on the plane without providing him the *Miranda* warnings. We hold that in this instance, the "public safety" exception to the *Miranda* warning requirement applies and permits the admission of al-Hazimi's statements.

Courts across the country maintain different standards for what may rise to the level of the "public safety" exception articulated in *Quarles*. *See*, *e.g.*, *United States v. Estrada*, 430 F.3d 606, 612 (2d Cir. 2005). In *United States v. Talley*, the Sixth Circuit deemed questioning without *Miranda* warnings permissible when "officers have a reasonable belief based on articulable facts that they are in danger." *United States v. Talley*, 275 F.3d 560, 563 (6th Cir. 2001). This "reasonable belief" involves a variety of factors including "the known history and characteristics of the suspects, the known facts and circumstances of the alleged crime, and the facts and circumstances confronted by the officer." *United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007). The court in *Williams* further clarified the public safety exception in mandatory terms, requiring that an officer "have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it." *Id*.

al-Hazimi's contention that his statements to the team of FBI investigators aboard the American aircraft should have been suppressed based on a violation of his *Miranda* rights fails because the remarks fall within the public safety exception. Under the logic articulated in *Quarles*, the team of investigators maintained reasonable belief that the public was in danger. Such "reasonable belief" stemmed directly from the known facts and circumstances of the deadly nature of the April 1 attack. Fulfilling the mandatory nature of the public safety exception as expressed in *Talley*, the investigators had strong reason to believe that (1) al-Hazimi was recently in possession of an explosive device and

(2) that another person could access an associated weapon with the petitioner and inflict further harm with it.

In similar cases to the facts at hand, wherein individuals suspected of terrorism have been questioned without *Miranda* warnings, courts across the country have deemed this process legal under the public safety exception. In *United States v. Khalil*, one of the defendants, Abu Mezer challenged the district court ruling that the "public safety" exception permitted interrogation without *Miranda* warnings. *United States v. Khalil*, 214 F.3d 111, 121 (2d Cir. 2000). Mezer specifically took issue with the admission of a particular statement to government officials. In response to being asked whether or not he intended to kill himself after detonating the pipe bombs in question, he replied "poof." *Id*. The Second Circuit affirmed the lower court's decision, declaring the question and Mezer's response to be related to matters of public safety. Specifically, the court argued that it was related to public safety "given that Abu Mezer's vision as to whether or not he would survive his attempt to detonate the bomb had the potential for shedding light on the bomb's stability." *Id.* As such, the associated officers were not required to administer the *Miranda* warnings.

Parallel to the defendant in *Khalil*, al-Hazimi asserts that his statements to the team aboard the aircraft should have been suppressed. He specifically argues that some of the questions were not related to issues of public safety. We cannot agree. According to the evidence presented, we have no reason to believe that the team of investigators posed any questions unrelated to the matter of public safety. Similar to the question at issue in *Khalil*, we do know that the investigators' inquiries were aimed at "shedding light" on the April 1 attack and associated explosive devices. *Id*.

The Sixth Circuit additionally addressed the "public safety" exception with respect to bombs. In *United States v. Hodge*, while executing a search warrant for evidence of a methamphetamine lab, detective Bryan Gandy and police officer Marc Pierce asked Lonnie Hodge whether there was "anything in the house that could get anyone there hurt." *United States v. Hodge*, 714 F.3d 380, 387

(6th Cir. 2013). After Hodge replied that there was a pipe bomb in the home, Gandy and Pierce commenced a line of questioning aimed at gaining "information about the bomb's construction and stability." *Id*. In reaching its conclusion, the court considered the distinct threats guns and bombs each pose, particularly given the uniquely unstable nature of explosives. *Id*. at 386. The majority in *Hodge* determined that "in a case involving a *gun*, the police must be aware of a third party who can access the gun and harm others…but in a case involving a *bomb*, the presence of third parties who can access the bomb is usually not a compelling consideration." *Id*. *Hodge* establishes the public safety exception to be "limited to situations where the "weapon" in question is one that a person must physically handle in order for it to present a threat to officers." *Id*.

al-Hazimi argues that under the logic of *Hodge*, his statements made aboard the aircraft were not properly admitted. Specifically, he contends that as explosive devices were involved in the April 1 attack, the potential or literal presence of third parties who could access associated pipe bombs was not a compelling consideration. However, we believe that al-Hazimi has grossly misconstrued the Sixth Circuit's interpretation of the threat third parties pose in accessing explosive devices such as bombs. While *Hodge* did differentiate between the threat guns and bombs raise, the court deemed the officers' questions regarding the bomb's construction and stability acceptable. As such, we believe that the statements aboard the aircraft were properly admitted under the logic of *Hodge*.

The Eleventh Circuit addressed a similar issue concerning pipe bombs in *United States v. Spoerke*. *United States v. Spoerke*, 568 F.3d 1236 (11th Cir. 2009). The case considered whether or not the public safety exception permitted police officers to question the defendant without providing sufficient *Miranda* warnings after discovering that he was in possession of unregistered pipe bombs. The court determined that the pipe bombs posed a significant threat to the officers in question and the greater public that outweighed the interests originally articulated in *Miranda*. *Id*. at 1249.

al-Hazimi additionally argues that his statements to FBI investigators aboard the aircraft should not have been admitted under the public safety exception by differentiating the facts at hand from *Spoerke*. The petitioner specifically points to the court's statement that the "questions were designed to discern the threat the bombs presented to the officer and the nearby public." *Id*. He argues that the team of investigators' questions were not designed to discern the threat of the pipe bombs associated with the April 1 attack. Specifically, he supports this assertion by pointing to the length of time that had passed since the incident – over 20 days. But the investigators' questions were posed to determine if al-Hazimi had other explosives that could pose a threat to the public. The team's inquiries were motivated by safety concerns, and as such, fall within the *Quarles* exception.

The application of the public safety exception to terrorism-related cases was recently explored in *United States v. Abdulmutallab*. *United States v. Abdulmutallab*, 739 F.3d 891 (6th Cir. 2014). This case concerned Umar Farouk Abdulmuttalab, often referred to as the "underwear bomber" or "Christmas Day Bomber," a member of a violent jihadist organization affiliated with al-Qaeda. *Id*. at 895. Abdulmutallab boarded a flight on December 25, 2009 with the intention of detonating "an explosive device in his underwear." *Id*. The device instead malfunctioned and as a result of the attempted attack, the pilot subsequently executed an emergency landing. After being transferred to a hospital for treatment, FBI Special Agent Timothy Waters questioned Abdulmutallab for approximately fifty minutes without *Miranda* warnings. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011).

Affirmed by the Sixth Circuit, the district court determined that the public safety exception applies to the circumstances at hand. *Id*. at *5. The questions posed by Agent Waters "were intended to shed light on the obvious public safety concerns in this case." *Id*. Specifically, such questions "sought to identify any other attackers or other potentially imminent attacks—information that could be used in

conjunction with other U.S. government information to identify and disrupt such imminent attacks before they could occur." *Id*.

al-Hazimi argues that his statements to the team of FBI investigators should be suppressed in distinguishing the facts from that of *Abdulmutallab*. The petitioner emphasizes the discrepancy in questioning periods, with Abdulmutallab's occurring for 50 minutes and his own lasting 14 hours. al-Hazimi points to the district court's potentially restrictive language; "the agents limited their questioning to approximately 50 minutes, at which time they had sufficient information to address the threat to public safety." *Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *6. However, the team of FBI investigators at issue also limited their questioning but necessitated more time to obtain sufficient information to address the threat at hand.

There are key factual similarities that further minimize the persuasiveness of al-Hazimi's argument. Specifically, the court notes that Agent Waters knew of the defendant's claim to be associated with and acting on behalf of al-Qaeda – which is almost identical to our understanding of the FBI investigators' knowledge of al-Hazimi. The district court in *Abdulmutallab* determined that mindful of such association "and knowing the group's history of large, coordinated plots and attacks, the agents logically feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world." *Id*. The team aboard the aircraft maintained similar knowledge and fear of al-Qaeda's coordinated history and accordingly posed questions aimed at obtaining information regarding potential imminent attacks.

II.

al-Hazimi additionally argues that his statements made to South Sudanese representatives, in addition to any reference to such utterances, should not be admitted into evidence. He contends that the interview constitutes a "joint venture" between South Sudanese officials and United States law enforcement. The law has determined that "statements taken by foreign police in the absence of

Miranda warnings are admissible if voluntary." *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003). However, the "joint venture" doctrine is an established exception to this rule. The Second Circuit provides that "statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities." *Id.*

The Ninth Circuit additionally concluded that under this doctrine "evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States." *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980). "Active" or "substantial" participation refers to evidence wherein the United States "encouraged, requested, or participated in [suspect's] interrogation or written statement." *Yousef*, 327 F.3d at 144-145. We have not been provided sufficient evidence that American officials "actively" or "substantially" participated in the South Sudanese questioning. The United States government was only informed of an inquiry *after* it had occurred. As such, al-Hazimi has failed to demonstrate that the South Sudanese questioning rises to the level of a "joint venture."

The questions posed to the petitioner by the team of FBI investigators while aboard the American aircraft were admissible as they did not fall within the public safety exception to the *Miranda* warnings. Additionally, al-Hazimi's statements, or references to such statements, to South Sudanese representatives should be admitted into evidence as he has failed to establish a "joint venture" between the foreign government and that of the United States.

For these reasons, we AFFIRM.

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR joins, dissenting.

The issue at hand today serves to prove that Justice Marshall's deep concerns regarding the public safety exception, as expressed in his perturbed dissenting opinion in *Quarles*, were correct. The majority rejects al-Hazimi's challenge to suppress statements made to the team of FBI investigators aboard an American aircraft under the public safety exception articulated in *Quarles*. In doing so, the majority has endorsed a sweeping interpretation of the exception, illustrative of the very chaos Marshall alluded would occur as a result of the expansiveness of the public safety exception. *Quarles*, 467 U.S. at 679.

I.

The original interpretation of the public safety exception, as set forth in *Quarles*, maintains significant flaws in application. Justice Marshall noted that "disagreements of the scope of the "public-safety" exception and mistakes in its application are inevitable." *Id*. at 680. The majority's decision today exacerbates these mistakes by grossly expanding the exception. While already expansive, the facts at hand extend the limits of the public safety exception far beyond its current restrictions. The interrogation occurred 20 days following the attack in question and lasted 14 hours. In doing so, the court only further destroys any remaining "clarity of *Miranda* for both law enforcement officers and members of the judiciary." *Id*. at 679. Similar to the *Quarles* majority, the government faintly contends that in withholding *Miranda* warnings, the team of FBI investigators were able to extract information from al-Hazimi they might not have had he been advised of this right. *Id*. at 685.

I do not intend to suggest that there are absolutely no instances wherein law enforcement officers in the face of an immediate threat cannot question suspects without providing the *Miranda* warnings. Even Justice Marshall's *Quarles* dissent did concede the importance of an exception with regards to immediate threats, offering the example of a bomb. Marshall stated "if a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights." *Id*. at 686. Rather, I am deeply concerned that the

court's decision today broadens the scope of the public safety exception beyond recognition and appropriate application.

Beyond this deeply concerning expansion, the majority gravely misapplies the public safety exception with respect to the facts at hand. As originally described in *Quarles*, the majority described the necessity for the lack of sufficient *Miranda* warnings; "Officer Kraft needed an answer to his question not simply to make his case against Quarles but to ensure that further danger to the public did not result from the concealment of the gun in a public area." *Id.* at 657.

The court placed significant emphasis on the time involved in such decisions, stating "we decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings." *Id.* The team of FBI investigators interrogated al-Hazimi aboard an American aircraft for 14 hours – a period far exceeding the mere seconds in *Quarles*. As such, the majority grossly misrepresents the immediacy requirement of the public safety exception.

Additionally, the court mistakenly dismisses the petitioner's parallel to the Sixth Circuit's decision in *Hodge*. In *Hodge*, the court emphasized the fact that "the relatively limited inquiry [the officers] made was appropriately tailored to the information they possessed." *Hodge*, 714 F.3d at 387. The 14-hour long interrogation at issue was not limited in its inquiry, as provided evidence establishes that the conversation was in reality "wide-ranging." In applying the logic of *Hodge*, the team of FBI investigators' questions were not appropriately tailored to the information they possessed. As such, the court gravely errs in permitting the admission of the statements aboard the aircraft.

The majority additionally blunders in determining the facts to be especially similar to those in *Spoerke*. There is in actuality a significant distinction that directly impact the admissibility of al-Hazimi's statements to FBI investigators. The court dismissed the petitioner's argument that the whole

of the FBI investigators' inquiries were not truly "designed to discern the threat the bombs presented" to the public, given the lengthy period of time that had passed since the original attack. *Spoerke*, 568 F.3d at 1249. The majority reaches this conclusion after being persuaded that the team's questions were aimed to discover whether or not al-Hazimi had knowledge of other explosives that posed significant threats to the public.

However, the actual inquiries at hand and in *Spoerke* are significantly different. In *Spoerke*, the officer physically saw "two duct-taped balls with a green string attached, which he suspected to be improved explosive devices." *Id*. at 1241. After noticing these items, Officer Haugh asked what they were. Spoerke replied "that they were "pipe bombs" that they "liked to throw…in canals and watch explode." *Id*. This confirmation led the officer to further inquire about the materials used to build these explosive devices. *Id*. These questions were specific and explicit in their aim to "discern the threat the bombs presented." *Id*. at 1249. While we do not have a direct transcript of the 14-hour-long aerial interrogation, the lengthy duration indicates that it is not possible that every single one of the investigators' questions was specific and explicit in discerning the threat al-Hazimi posed to the public.

II.

Beyond the public safety exception, the majority additionally erroneously concluded that the South Sudanese inquiry of al-Hazimi did not constitute a "joint venture" between foreign interrogators and United States law enforcement officers. In describing the doctrine, the court fails to note the existence and significance of *United States v. Emery*, a similar case that established the existence of a joint venture. *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978).

In determining "substantial" participation, the Ninth Circuit points to the fact that associated Drug Enforcement Administration (D.E.A.) agents "alerted the Mexican police of the possible activity" and "supplied the pilot for the plane." *Id*. at 1268. With respect to the issue at hand, South Sudanese representatives alerted American officials of their findings, with the U.S. providing an

aircraft. The majority certainly cannot intend to suggest that requirements for "active" or "substantial" participation hinge on *which* country does *which* action. Rather, we should be focused on the fact that any action or coordination took place at all. In a broader sense, "the constitutional safeguards of *Miranda* should not be circumvented merely because the interrogation was conducted by foreign officials in a foreign country." *Id.*

Today, the court extends the scope of the public safety exception far beyond recognition. For decades, the foundation on which the *Miranda* warnings stand has stated that in order "to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, 384 U.S. at 467. In denying al-Hazimi's request to suppress statements made to FBI officials without such warnings, these very grounds have been dismantled. Despite the court's decision today, the privilege against self-incrimination "applies to all individuals," even those accused of the most heinous and horrifying crimes, such as acts of terrorism. *Id.* at 472. For these reasons, I respectfully dissent.

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Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a brief for defendant Davidson Datavault on a fictional Article III standing claim in the Seventh Circuit. To create a 10-page writing sample, I omitted the Table of Contents and Authorities, the Statement of Jurisdiction, the Statement of the Facts, the Standard of Review, and the Certificate of Compliance. This brief has not been edited by others.

The basic facts of the fictional scenario are as follows: Defendant Davidson Datavault was the victim of an unfortunate data breach. Upon discovering the breach, they notified all ten thousand of their customers and extended an offer of free credit monitoring and identify theft protection for a year. One of the customers, Danny Midway, took advantage of the offer and accepted the monitoring and protection services. In addition to this, the appellant undertook additional preventative measures to secure their information. Despite the Appellant's contention that these extra steps ensured the security of their sensitive information, not a single Datavault customer suffered an instance of theft.

STATEMENT OF THE ISSUE

Whether the district court properly granted Datavault's motion to dismiss for lack of Article III standing as Danny Midway failed to present evidence that he suffered an injury in fact that was caused by the company and redressable by judicial relief.

STATEMENT OF THE CASE

I. Proceedings Below

Datavault motioned to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of Article III standing. The district court ordered that Datavault's motion to dismiss was granted, Midway's complaint was dismissed without prejudice, and judgment was entered in favor of Datavault.

SUMMARY OF THE ARGUMENT

The district court's grant of Datavault's motion to dismiss was proper and should be affirmed. In order to establish Article III standing, Midway had to demonstrate "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would be redressed by judicial relief." *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)). Midway did not suffer an injury in fact as the alleged injury was not in fact concrete, particularized, or actual or imminent. Additionally, the purported injury was caused by third-party hackers, and not the fault of Datavault. Lastly, the court does not have an injury to potentially redress by judicial relief. The district court correctly analyzed the issue at hand in view of applicable Supreme Court and Seventh Circuit precedent. As a result, the district court's conclusion that Midway failed to establish Article III standing was precisely accurate.

ARGUMENT

I. The District Court Correctly Determined that Midway Lacked Article III Standing

Midway lacks Article III standing to bring forward the action in question. As previously discussed, in order to establish Article III standing, Midway "must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would be redressed by judicial relief." *Id.* The Seventh Circuit recently upheld this determination in *Pierre v. Midland Credit Management, Inc.*, 29 F.4th 934, 936 (7th Cir. 2022). Midway did not suffer an injury in fact as the alleged injury was not concrete, particularized, or actual or imminent. Additionally, the alleged injury was not caused by Datavault, but rather by third-party hackers. Lastly, the alleged injury put forth by Midway would not be redressed by judicial relief.

II. Midway did not suffer from an injury in fact as the alleged injury was not concrete, particularized, or actual or imminent

A. Midway Did Not Suffer from a Concrete Injury

Midway failed to establish that the alleged injury was concrete. The court has asserted that "central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez,* 141 S. Ct. at 2200. Additionally, the court has defined concreteness as being ""real," and not "abstract."" *Spokeo, Inc. v. Robins,* 578 U.S. 330, 339 (2016). Such harms are limited to being physical and monetary in nature. *TransUnion LLC v. Ramirez,* 141 S. Ct. at 2200.

1. The Harm was Not Physical in Nature

Midway did not experience a harm that was physical in nature. Midway may argue that he suffered a physical injury due to his alleged insomnia. *Midway*, slip. op. at 8. However, he failed to provide any evidence that said insomnia was intrinsically linked to the supposed actions of Datavault. Midway merely stated that he "experienced insomnia." *Id.* He did not declare that said insomnia was in direct correlation to the data hack.

2. The Harm was Not Monetary in Nature

Midway additionally did not sustain a harm that was monetary in nature. He could contend that he suffered a monetary injury as he incurred costs to monitor and alter his financial accounts, including costs to his business. *Id.*at 9. However, Datavault offered Midway free credit monitoring and identity theft protection from Morse Monitoring for a year as a means of mitigating such costs. *Id.*at 5. Midway's acceptance of such protection indicates that any additional financial expenditures were wholly voluntary and unnecessary. Midway may argue that his estimated lost time of ten hours spent on manually changing each of the usernames and passwords he stored in Datavault resulted in financial injury. *Id.*at 6. He could contend that these ten hours could have been spent operating his business and acquiring monetary gains. However, the choice to manually change such usernames and passwords over the phone rather than online was superfluous. Additionally, Midway could assert that he suffered financial injury as a result of canceling his credit card stored on Datavault and placing a temporary security freeze on his credit report. *Id.*at 7. Any financial loss acquired as a result of this action is entirely within Midway's responsibility. Any action on the part of Datavault did not require Midway to cancel his credit card and halt him from getting additional credit.

3. The Harm Did Not Constitute the Category of Various Intangible Harms

However, "various intangible harms can also be concrete." *TransUnion LLC v. Ramirez,* 141 S. Ct. at 2204. "Both history and the judgment of Congress play important roles" in determining whether or not an intangible harm meets the concreteness requirement. *Spokeo, Inc. v. Robins,* 578 U.S. at 340. Recognized intangible harms include but are not limited to "reputational harms, disclosure of private information, and intrusion upon seclusion." *TransUnion LLC v. Ramirez,* 141 S. Ct. at 2204.

Midway argues that as a result of the data hack he suffered from emotional distress. *Midway*, slip. op. at 9-10. Emotional distress does not constitute physical or monetary harms. *TransUnion LLC v. Ramirez,* 141 S. Ct. at 2198. Midway will likely argue that concreteness is established because emotional distress falls under the category of various intangible harms. However, emotional distress

has not been historically recognized as an intangible harm, and thus should not be considered. *Id.* at 2204.

Midway may additionally argue that the loss of his private information during the data hack constitutes an intangible harm. He could contend that as a result of the hack he had an increased risk of identity theft and fraudulent credit charges. Midway may support this argument concerning risk by evoking *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). The court stated, "our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Id.* at 414 n.5.

However, *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 695 (7th Cir. 2015) addresses a similar question to the one at hand wherein "the plaintiffs also allege that they have a concrete injury in the loss of their private information, which they characterize as an intangible commodity." The court refrained "from supporting standing on such an abstract injury." *Id.* As Midway's argument relies on an analogous potential and abstract risk, the court must dismiss this argument. Additionally, the court should not give great weight to a potential argument concerning a seeming indifference to being "literally certain that the harms they identify will come about." *Clapper v. Amnesty International USA*, 568 U.S. at 414 n.5. The court should do so because "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm." *Id.* Midway has not provided the court with sufficient information demonstrating that Datavault's actual action produced a substantial risk of harm. As a result, the court should dismiss this argument for a concrete injury. As previously discussed, Midway failed to establish that he suffered from a concrete injury, and therefore lacks Article III standing.

B. Midway Did Not Suffer from a Particularized Injury

Midway failed to establish that he suffered from a particularized injury. In *Lujan*, the court determined that the term "particularized" suggested, "that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 n.1. There is no evidence

to suggest that the hack affected Midway in a personal or individual manner. Datavault was one of ten known technology companies to have suffered a similar hack of their data. *Midway*, slip. op. at 6. The hack that Datavault endured was part of a larger assault on several technology companies and their many clients. *Id.* Midway was not affected in a more personal or individual manner than any other customer of said technology companies. Additionally, approximately only one hundred incidents of identity theft have been traced to the Allison Attacks at two of the other companies. *Id.* There is no evidence in the record to suggest that even a single incident of identity theft has been traced specifically to Datavault. *Id.* at 8. Midway additionally has not alleged that he personally experienced any fraudulent transactions or had his identity stolen following the Allison Attack. *Id.* While the data hack might be inconvenient for those potentially affected, Midway has not presented any evidence that he was affected in a personal or individual way.

C. Midway Did Not Suffer from an Actual Or Imminent Injury

Midway did not suffer an injury that was actual or imminent. In examining the requirement that the injury be actual or imminent, *City of Los Angeles vs. Lyons*, 461 U.S. 95, 96 (1983) states that "the injury or threat of injury must be "real and immediate," not "conjectural" or "hypothetical."" While *Lyons* offers some insight into what imminence is, the concept "is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes - that the injury is certainly impending" *Lujan v. Defs. of Wildlife*, 504 U.S. at 565 n.2. In addition to the threatened injury being certainly impending, "allegations of possible future injury are not sufficient." *Clapper v. Amnesty International USA*, 568 U.S. at 409. The issue raised by Midway concerns a possible future injury, which is not certainly impending.

1. Midway Did Not Suffer from an Actual or Imminent Injury of Increased Risk of Identity Theft and Fraudulent Credit Charges

While Datavault did suffer a hack of their data, Midway was not really and immediately at risk of experiencing an increased risk of identity theft and fraudulent credit charges. In considering whether or

not Midway is really at risk of experiencing an increased risk of identity theft and fraudulent credit charges, the court should look to *Kylie S. v. Pearson PLC*, 475 F. Supp. 3d 841 (N.D. Ill. 2020). *Kylie S.* considers two factors as to "whether a data breach exposes consumers to a material threat of identity theft… (1) the sensitivity of the data in question…and (2) the incidence of "fraudulent charges" and other symptoms of identity theft." *Id.* at 846. These two factors should be interpreted as a two-prong test wherein both elements must be fulfilled. This two-prong requirement derives from the fact that *Kylie S.* employs the crucial term "and" in discussing both factors. *Id.*

Midway fails to present sufficient evidence that both *Kylie S.* factors are fulfilled. Notably, the second prong of the test was not satisfied. In reference to "the incidence of "fraudulent charges" and other symptoms of identity theft," Midway may signal the court to the one hundred incidents of identity theft that have been traced to the breaches at two of the other companies. *Id.* Although some individuals have experienced theft associated with the larger hack, this is a lawsuit concerning Datavault. As such, the court should restrict the scope of its analysis to Datavault. Not one Datavault user has experienced any fraudulent transactions or had their identity stolen. *Midway*, slip. op. at 8. Consequently, the *Kylie S.* factors were not fulfilled illustrating that Midway was not really and immediately at risk of experiencing an increased risk of identity theft and fraudulent credit charges.

Affording individuals such as Midway, who have not experienced any fraudulent transactions or had their identity stolen, the opportunity to bring forward Article III claims would result in a substantial strain on judicial resources. Such a decision would permit considerable amounts of litigation to proceed as a minimum of ten thousand Datavault customers could come forward with claims for Article III standing without ever having suffered an injury. *Id.* at 5. This quantity does not even encompass customers of the nine other technology companies that suffered an Allison Attack, which could considerably increase the number of individuals that could come forward with potential claims. *Id.* at 6.

With regards to the immediacy aspect of the requirement, as previously mentioned, the hack on Datavault was additionally experienced by nine other known technology companies. *Id.* Only approximately one hundred incidents of identity theft have been traced to the Allison Attacks at two of the other companies as a result of these attacks. *Id.* Midway has not alleged that he, or any other Datavault user, experienced any fraudulent transactions or had their identity stolen since the initial Allison Attack on the Datavault system between September 1 and October 1, 2020. *Id.* at 5, 8. Approximately ten or eleven months has passed since the initial Allison attack and not a singular Datavault customer has appeared to have been impacted by this alleged risk. As a result, Midway's purported risk is not immediate or certainly impending in nature.

2. Midway Did Not Suffer from an Actual or Imminent Injury of Incurred Costs

Midway has failed to prove that his incurred costs to monitor and alter his financial accounts were in response to an actual or imminent risk. Mitigatory expenses are only justified when they are taken in response to an imminent risk. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d at 694. As discussed previously, Midway has failed to prove that the risk he faces is imminent. However, even if Midway could prove that the risk he faced was imminent, the subsequent mitigatory steps would have to be reasonable. *In Re Hannaford Bros. Co. Customer Data Sec. Breach Litigation,* 4 A.3d 492, 496 (ME 2010) states that plaintiffs can "recover for costs and harms incurred during a reasonable effort to mitigate." The incurred costs Midway adopted to monitor and alter his financial accounts were not reasonable after accepting Datavault's offer of free credit monitoring and identity theft services.

Midway's choice to manually change each of the usernames and passwords he stored in Datavault was not reasonable. *Midway*, slip. op. at 6. This choice was unreasonable because he had the opportunity to change the usernames and passwords online, but selected to do so over the phone knowing that this would result in a much longer process. While he was concerned about the security risk of resetting his usernames and password online, this decision was illogical as it was not based in a real or immediate risk. Midway's choice to cancel his credit card stored on Datavault was additionally

unreasonable. *Id.* at 7. After having accepted Datavault's offer of free credit monitoring and identity theft services, Midway would have been notified if his credit card faced threat. *Id.* at 6. The cancellation of said credit card was thus illogical. As a result, the costs incurred as a result of Midway's decision to cancel this credit card are squarely within his responsibility. Midway's decision to place temporary security freeze on his credit report to stop any new credit being taken out in his named was furthermore unreasonable. *Id.* at 7. The free credit monitoring and identity theft services would have additionally notified him if any new credit was taken out in his name. The choice to temporarily freeze the credit report was born out of irrationality and should not be regarded as reasonable as a result. Ultimately, Midway's purported mitigatory expenses were not in response to an actual or imminent risk.

3. Midway Did Not Suffer from an Actual or Imminent Injury of Emotional Distress

Midway has failed to prove that he suffered from emotional distress in response to an imminent risk. As considered previously, the risk Midway claims to face is not imminent in nature. However, even if the court were to determine that the risk was imminent, Midway was unsuccessful in providing evidence that the emotional distress that he is purported to have experienced was a result of the data hack.

While he disclosed that he spent more than one therapy session focused on his alleged anxiety related to the greater Datavault hack, Midway was already regularly treated by said therapist for general anxiety. *Midway,* slip. op. at 8. As a result, it would be difficult to ascertain whether or not the anxiety he presumes to have experienced and discussed with his therapist was a result of the hack or his general anxiety disorder. Therefore, Midway failed to establish a direct correlation between the data hack and specific anxiety.

Even supposing Midway had provided sufficient evidence that he experienced emotional distress as a direct result of the hack, the court does not recognize emotional harm as sufficient for Article III purposes. In *TransUnion LLC* the court states "a plaintiff's knowledge that he or she is exposed to a

risk of future physical, monetary, or reputation harm could cause its own current emotional or psychological harm." *TransUnion LLC v. Ramirez,* 141 S. Ct. at 2211 n.7. However, the court goes onto declare that "we take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes." *Id.* While the Supreme Court has not selected to determine whether or not an emotional harm should satisfy Article III standing, the Seventh Circuit held that "stress by itself with no physical manifestations and no qualified medical diagnosis amount to a concrete harm." *Pennell v. Global Trust Management, LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021). The court should apply the determination of the *Pennell* decision and dismiss Midway's argument that he suffered from emotional distress as a result of the greater hack.

II. The alleged injury was not likely caused by Datavault

Midway has failed to provide evidence that the alleged injury was caused by Datavault. With respect to causation, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976) held that an alleged injury must be "fairly…trace[able] to the challenged action of the defendant, and not…th[e] result [of] the independent action of some third party not before the court." Midway's claims derive from a hack on Datavault by external hackers. *Midway*, slip. op. at 5. Therefore, the alleged injury was not in fact fairly traceable to Datavault, but rather the independent action of a third party that is not before the court.

III. The alleged injury would not be redressed by judicial relief

The alleged injury put forth by Midway would not be redressed by judicial relief. With regards to redressability, the court states that "the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an inquiry to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 37. However as considered previously, Midway has failed to provide sufficient evidence that there was an injury in fact. *Casillas v. Madison Avenue*, 926 F.3d 329, 332 (7th Cir.) considered a similar question and concluded that

"because Madison's violation of the statute did not harm Casillas, there is no injury for a federal court to redress." As a result, the court does not have an injury in fact to redress by judicial relief.

CONCLUSION

The alleged injury Midway purports to have experienced was not concrete, particularized, or actual or imminent. Midway additionally failed to demonstrate causation as the alleged injury was not caused by Datavault, but rather third-party hackers. By virtue of there being no established injury in fact, there is no injury for the court to potentially redress.

For the reasons set forth herein, Datavault respectfully requests that this Court affirm the district court's order granting judgment against Midway and in favor of Datavault.

Applicant Details

First Name	**Patrick**
Middle Initial	**C**
Last Name	**Hynds**
Citizenship Status	**U. S. Citizen**
Email Address	**pchynds@gmail.com**
Address	**Address** Street **214 Canyon Terrace Dr.** City **El Paso** State/Territory **Texas** Zip **79902** Country **United States**
Contact Phone Number	**3179101034**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**December 2015**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2019**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Philip C. Jessup International Law Moot Court Competition** **Van Vleck Constitutional Law Moot Court Competition**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 26, 2023

The Honorable Stephanie Dawkins Davis
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis,

I am writing to apply for a 2024-2025 clerkship with your chambers. I am currently serving as a two-year term clerk for Judge David Guaderrama on the U.S. District Court for the Western District of Texas. I am originally from Indiana and have otherwise spent time in Washington, DC and El Paso, TX.

Prior to my clerkship, I worked at Hogan Lovells. While there, I developed a keen interest in litigation, election law, and voting rights. I was fortunate to have the opportunity to work on several election-related projects, including drafting amicus briefs for a case before the California Courts of Appeal and then the California Supreme Court. I also co-led a multistate initiative to sign up attorneys and law firm staff as poll workers. I hope to continue work related to improving our government and democracy.

For me, my district court clerkship came with a fortuitous event. Judge Guaderrama received the Texas redistricting cases. These cases have taught me how to support a panel of judges and consider my judge's position on issues against the need to work together as a three-judge court. I have also learned how to assess and incorporate feedback from multiple sources, with sometimes widely varying opinions.

I am especially interested in clerking on the Sixth Circuit because it encompasses much of the Midwest. Though my home state of Indiana is in the Seventh Circuit, I would be honored to serve the region I spent so many years in.

Finally, I have been lucky to spend nearly two years on a district court, during which time I have learned countless lessons about trial-level work. But that is not the whole of our legal system. Clerking on an appeals court will help me gain a more holistic understanding of the role the judiciary plays in peoples' lives. That will, in turn, make me a better advocate in my future work.

Please feel free to contact my references:

Judge David C. Guaderrama	**Hilary C. Tompkins**	**Professor David Fontana**
(915) 534-6005	(202) 664-7831	(202) 994-0577
david_guaderrama@txwd.uscourts.gov	hilary.tompkins@hoganlovells.com	dfontana@law.gwu.edu

Thank you for taking the time to consider my application. I look forward to hearing from you.

Respectfully,
Patrick C. Hynds
Patrick Hynds

Patrick Hynds

214 Canyon Terrace Dr., El Paso, TX 79902 | (317) 910-1034 | pchynds@gmail.com | D.C. Bar No. 1671023

Education

The George Washington University Law School (Washington, DC)
Juris Doctor, with High Honors (GPA: 3.789) May 2019

Honors & Awards: High Honors (Top 10%); Order of the Coif; Imogen Williford Constitutional Law Award; Judge Albert H. Grenadier Award; Dean's Excellence in Advocacy Award

Activities: *The George Washington Law Review* (Notes Editor); Moot Court Board (Member); Jessup International Law Moot Court Competition (Finalist and Best Memorial); International Arbitration Student Association (President, 2017–18); Van Vleck Constitutional Law Moot Court Competition (Competitor); SBA Senate (Senator, 2018–19)

Indiana University, College of Arts and Sciences (Bloomington, IN)
Bachelor of Science in Biochemistry and *Bachelor of Arts in History* December 2015

Academic Publications

Toward A More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact, 15 HARV. L. & POL'Y REV. 145 (2021) (with Rob Richie et al.)

Experience

The U.S. District Court for the Western District of Texas (El Paso, TX)
Law Clerk to Judge David C. Guaderrama August 2021 – Present

- Managed the civil docket and assisted with substantive matters on the criminal docket
- Helped prepare for civil and criminal hearings and trials, and provided assistance during hearings and trials
- Worked on the consolidated Texas redistricting cases, which are before a three-judge court

Hogan Lovells US LLP (Washington, DC)
Associate September 2019 – May 2021

- Co-authored *amicus* briefs and multiple memoranda about voting rights issues
- Assisted with FCPA and sanctions violations investigations
- Supported or led numerous pro bono matters in diverse areas, including asylum, child custody, solitary confinement, arbitrary detention, and election-related issues during the COVID-19 pandemic

Summer Associate May 2018 – July 2018

- Worked primarily on appellate and international trade matters

The George Washington University Law School (Washington, DC)
Research Assistant for Professor Edward Swaine September 2018 – May 2019

- Reviewed, analyzed, and edited a treatise on U.S. foreign relations law

Research Assistant for Professor David Fontana January 2018 – May 2019

- Researched and compiled data on out-of-state campaign contributions for a campaign finance reform project
- Explored and summarized law relating to the organization of the federal government

United States Department of State Office of the Legal Adviser (Washington, DC)
L/CID Intern January 2019 – April 2019

- Drafted memos in preparation for U.S.-Iran Claims Tribunal briefings and arguments
- Prepared information relating to claims negotiations between the United States and foreign states

Personal Interests: mountaineering (highest altitude reached: 17,500 ft.); trail running; exploring new cuisine

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WASHINGTON, DC

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Page: 1

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Admit Term: Fall 2016

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Current Major(s): Law

Degree Awarded: J D 19-MAY-2019
With High Honors
Major: Law

EXPERIENTIAL REQUIREMENT MET
WRITING REQUIREMENT MET (6658)
JD RANK: 34/465

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2016			
	Law School		
	Law		
LAW 6202	Contracts I Maggs	3.00	B
LAW 6206	Torts Suter	4.00	A-
LAW 6210	Criminal Law Fairfax	3.00	A-
LAW 6212	Civil Procedure I Clark	3.00	A-
LAW 6216	Legal Research And Writing Clees	2.00	B+
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.489		
	CUM 15.00 GPA-Hrs 15.00 GPA 3.489		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16% - 35% OF THE CLASS TO DATE		
Spring 2017			
	Law School		
	Law		
LAW 6203	Contracts II Maggs	3.00	A-
LAW 6208	Property Tuttle	4.00	A-
LAW 6213	Civil Procedure II	3.00	B+
LAW 6214	Constitutional Law I Fontana	3.00	A
LAW 6217	Introduction To Advocacy Ilyas-Malik	2.00	A
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.711		
	CUM 30.00 GPA-Hrs 30.00 GPA 3.600		
	Good Standing		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16% - 35% OF THE CLASS TO DATE		
Summer 2017			
LAW 6668	Field Placement	1.00	CR
LAW 6671	Government Lawyering	2.00	B+
	Ehrs 3.00 GPA-Hrs 2.00 GPA 3.333		
	CUM 33.00 GPA-Hrs 32.00 GPA 3.583		

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2017			
	Law School		
	Law		
LAW 6250	Corporations Cunningham	4.00	A
LAW 6380	Constitutional Law II Colby	4.00	A
LAW 6522	Internatl Business Transaction Charnovitz	3.00	A+
LAW 6657	Law Review Note	1.00	P
LAW 6871	U.S. Foreign Relations Law Murphy	3.00	A
	Ehrs 15.00 GPA-Hrs 14.00 GPA 4.071		
	CUM 48.00 GPA-Hrs 46.00 GPA 3.732		
	Good Standing		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1%-15% OF THE CLASS TO DATE		
Spring 2018			
LAW 6360	Criminal Procedure Saltzburg	4.00	A
LAW 6399	Constitutional Law Seminar Mach	2.00	A
LAW 6520	International Law Murphy	4.00	A+
LAW 6556	International Arbitration Ryan	2.00	A
LAW 6642	Adr Competition (Spanogle) Johnson	1.00	CR
LAW 6657	Law Review Note	1.00	P
	Ehrs 14.00 GPA-Hrs 12.00 GPA 4.111		
	CUM 62.00 GPA-Hrs 58.00 GPA 3.810		
	Good Standing		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1%-15% OF THE CLASS TO DATE		

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SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2018			
LAW 6218	Prof Responsibility & Ethics Tuttle	2.00	A-
LAW 6230	Evidence (Skills) Saltzburg	4.00	B+
LAW 6395	Constitutional Law/Supreme Crt Colby	2.00	A-
LAW 6555	Comparative Constitutional Law Fontana	3.00	A
LAW 6644	Moot Court-Van Vleck Johnson	1.00	CR
LAW 6658	Law Review	1.00	CR
Ehrs 13.00 GPA-Hrs 11.00 GPA 3.636			
CUM 75.00 GPA-Hrs 69.00 GPA 3.783			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2019			
LAW 6232	Federal Courts Siegel	3.00	A
LAW 6400	Administrative Law Hammond	3.00	A-
LAW 6401	Selected Topics In Con Law Abel	1.00	A
LAW 6641	External Comp - Moot Court Buatte	1.00	CR
LAW 6658	Law Review Watson	1.00	CR
LAW 6667	Advanced Field Placement Mirko	0.00	CE
LAW 6668	Field Placement Tillipman	3.00	CR
Ehrs 12.00 GPA-Hrs 7.00 GPA 3.857			
CUM 87.00 GPA-Hrs 76.00 GPA 3.789			
Good Standing			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	87.00	76.00	288.00	3.789
OVERALL	87.00	76.00	288.00	3.789

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

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June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write in enthusiastic support of Patrick Hynds, who has applied to serve as a law clerk in your chambers, following his clerkship with Judge David Guaderrama on the United States District Court for the Western District of Texas. Patrick was my student in two different law school classes. I thus had the opportunity to get to know him quite well from interactions both inside and outside of class and I have nothing but positive things to say about him. He has a deep and powerful intellectual interest in the law, and would make an exceptional law clerk.

I first met Patrick when he was enrolled in my Constitutional Law II class in the fall of his second year of law school. Patrick stood out immediately as a superstar in that class. His comments in class were consistently the most impressive of all 100+ students in the room. And he frequently came to me after class or in office hours—not to impress me or to curry favor, but rather to seek and offer insight into the material. I can honestly say that, in my nearly 20 years of law teaching, I can think of only a handful of students who wrestled so deeply, openly, and impressively with the intricacies of constitutional law, doctrine, and theory.

Given all of that, I was not at all surprised to learn that Patrick earned a solid “A” grade on my blind-graded, strictly-curved Constitutional Law examination—one of only a few such grades that I awarded. He was able to spot arguments and complexities in the law that many seasoned lawyers would miss; and, just as impressively, he was able to explain those complexities in clear, concise prose—a rare combination of gifts that is particularly desirable in a law clerk.

Because Patrick had been such a uniquely valuable contributor in my large Constitutional Law class, I literally jumped for joy when I learned that he had been chosen by random lottery for a spot in my Constitutional Law and the Supreme Court seminar in his third year. Constitutional Law and the Supreme Court is a seminar about the institution of the Supreme Court of the United States, and in particular, about the ways in which the rules, procedures, and customs of that Court impact the development of constitutional law. Much of the class consists of role-playing: the students play the role of Justices of the Supreme Court of the United States, reading the briefs in actual cases pending in the Supreme Court, listening to (and sometimes actually attending) the oral arguments, in one case conducting a moot court for one of the advocates prior to her arguing in the Court, meeting in conference (class) to debate and decide the cases, and then drafting majority and dissenting opinions. A class like that is only as good as the students who sign up; I tend to sit quietly to the side and let the students handle the discussion on their own. If the students are unprepared, uninterested, or intellectually unimpressive, the entire class can amount to two hours a week of pulling teeth and staring at the clock. But with the right students, the class can be a resounding success—an exceptional law school experience. That year, the class went tremendously well, thanks in substantial part to Patrick.

Our seminar considered a number of contentious cases on hot-button issues like free speech, the death penalty, establishment of religion, and takings. It seemed like a lot of the students made up their minds upon reading the question presented. But Patrick was different. He invariably gave fair and serious consideration to all of the arguments and wrestled with every case. He understood the cases at a deeper level than most of his peers, and it showed. He put an extraordinary amount of work into the class, and it paid off. In a class full of Law Review editors (the class is so much work that it tends to scare away all but the most dedicated students), Patrick excelled. His comments in class were thoughtful, measured, and insightful. And his written assignments were every bit as good as his classroom performances. They read like real judicial opinions.

Because most of the work of the Constitutional Law and the Supreme Court seminar involves reading real briefs, determining the best means of resolving real, difficult cases, and drafting judicial opinions, the class provides the professor with an unusually good opportunity to evaluate a student’s potential performance as a law clerk. I can safely say that Patrick will be an outstanding clerk.

Remarkably, such impressive performances were par for the course for Patrick in law school. On the basis of his grades, Patrick was named a George Washington Scholar, the highest general academic distinction that we award at this school (which, as you probably know, is consistently ranked as one of the top 25 law schools in the country). Patrick graduated with High Honors, was inducted into the Order of the Coif, and was the recipient of several prestigious awards upon graduation, including the Imogen Williford Constitutional Law Award.

In addition to his academic success, Patrick somehow found the time to excel in a variety of extracurricular activities in law school: he held a highly-sought after, top executive position at the George Washington Law Review; he won advocacy awards in multiple moot court competitions; he was the President of the International Arbitration Student Association, and he served as a Senator in the student government. That Patrick was able to accomplish all of those things while still maintaining a stellar grade point average is a powerful testament to his intelligence, dedication, and work ethic.

In addition, Patrick would come to your chambers with valuable legal experience, having clerked on the District Court and having worked as an associate in a major law firm in DC. He also served as an intern in the Department of State Office of the Legal Advisor and as a law clerk in the US International Trade Commission.

In addition, on a personal level, Patrick is a jewel. He is kind, thoughtful, funny, and respectful—a truly good person through and

Thomas Colby - tcolby@law.gwu.edu - 202-994-0176

through. He would be a joy to have in chambers.

Having had the privilege of clerking myself — for Judge Guido Calabresi and Justice David H. Souter — I have a good sense of what it is that judges are looking for in a law clerk. Patrick has it in spades. I recommend him to you without reservation.

Sincerely,

Thomas B. Colby
John Theodore Fey Research Professor of Law

Thomas Colby - tcolby@law.gwu.edu - 202-994-0176

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write in my capacity as Pro Bono Partner of Hogan Lovells to support the application of Patrick Hynds for a judicial clerkship. For the reasons stated below, I highly recommend Patrick for such position.

I have known Patrick for several years. Since he was a Summer Associate, Patrick has been ranging from individual representations in immigration proceedings to voting rights cases and election reform matters. As evidence of his strong commitment to pro bono, Patrick was selected to become one of our Pro Bono Rotators, which allowed him to devote fulltime to pro bono matters for four months during his first year at the firm.

Hogan Lovells prides itself on our outstanding pro bono program. Indeed, we were the first firm - in 1970 - to establish a full time Pro Bono Department, with lawyers and support staff who devote virtually all of their time to pro bono matters. As such, we expect our Pro Bono Rotators to be mature, responsible, self-motivated and excellent attorneys.

I am pleased to report that, from my perspective, Patrick deserves the highest marks in all those categories. Since he rejoined the firm as an Associate, I've has the pleasure of working closely with Patrick on a number of voting rights cases and election reform matters. He has unfailingly risen to every task, to the point where I've entrusted him to assume leadership responsibilites that I would normally assign to someone more senior. Of particular note, despite his relative lack of seniority, Patrick was the lead associate in our national effort to recruit poll workers from the law firm community for last year's elections during the pandemic. He ably coordinated among more senior lawyers at other law firms, as well as with academics and government officials. Because of that outstanding work, I asked Patrick to serve as our representative on the Voting Rights Task Force of the Law Firm Antiracism Alliance, a national coalition among law firms to address racial inequity.

I also commend Patrick's research, writing and communication skills. I have found his research to be thorough, and his writing style is clear and concise. He has a very calm and friendly demeanor, making him a pleasure to work with.

In light of the foregoing, I have no reservations in recommending Patrick for a judicial clerkship.

If I can provide additional information, please do not hesitate to contact me.

Sincerely,

T. Clark Weymouth
Pro Bono Partner

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June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to support the application of Patrick Hynds for an appellate clerkship. Patrick has been an associate at this law firm for the past two years, and I have worked extensively with him, especially on a series of pro bono projects relating to voting rights.

I should start by introducing myself. I am now a Senior Counsel at Hogan Lovells, but from 2000 to 2020, I was a partner at the firm (or its predecessor, Hogan & Hartson) and a member of the firm's appellate practice. Before joining Hogan & Hartson, I had been an Assistant United States Attorney in the Southern District of New York, and served as Chief Appellate Attorney for the Criminal Division, responsible for supervising all of our work in the Second Circuit. I graduated from Harvard Law School, magna cum laude, in 1972; while at law school, I was the Supreme Court Editor of the Harvard Law Review. I clerked after graduation for Chief Judge Henry Friendly of the Second Circuit and Justice Thurgood Marshall on the Supreme Court.

I think that Patrick would be an excellent law clerk at the appellate level, and am pleased to support his application. I think that Patrick's legal skills are first-rate. He is an excellent writer: his writing is clear, straightforward and powerful, and he does a great job of presenting complex material in a way that is logical, persuasive and easy to grasp. His legal analysis is invariably very sound, insightful and right on point.

These fine qualities were most recently demonstrated in an amicus brief that we are filing today in the California Supreme Court on behalf of FairVote, a non-profit organization that supports voting reforms, including ranked-choice voting. The case is Pico Neighborhood Association v. City of Santa Monica, and involves difficult and novel questions concerning the proper interpretation of the California Voting Rights Act, and whether the City's use of at large elections is diluting the votes of the City's substantial Latino minority. Though I am the signatory on this brief, in fact Patrick has been almost single-handedly responsible for preparation of this brief. He thoroughly mastered the complex and arcane subject matter, made himself into an expert on the use of ranked-choice voting and other alternative election systems, and wrote an excellent first draft that needed little editing. And he did this on a pro bono case, in his "spare" time, in addition to the caseload he has been carrying for billable clients. The result is an outstanding brief on which I am proud to put my name.

As this example also demonstrates, Patrick is also an exceptionally hard worker, and shows a great deal of initiative. He is always willing to pitch in and take on a new assignment, even when he is already quite busy and could have easily avoided it. He is also a great pleasure to work with, good natured, upbeat and cheerful, and a real team player.

I think that he would be a huge asset to any appellate judge. I would be happy to answer any questions you may have. Please feel free to contact me if there is any further information I could provide.

Respectfully submitted,

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June 26, 2023

The Honorable Stephanie Dawkins Davis
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis,

Please find one of my writing samples attached. This writing sample is entirely my own; it has not been edited by anyone other than myself.

I wrote this draft opinion in a case about the denial of social security benefits. The plaintiff alleged, among other things, that the Administrative Law Judge did not apply the proper legal standard when he reviewed and denied the plaintiff's benefits applications.

Judge Guaderrama first referred the case to a magistrate judge for a report and recommendation. After the magistrate judge issued his report and recommendation, the plaintiff objected to it. I then drafted the opinion below, which rejects the magistrate judge's recommendation and remands the case to the Social Security Administration for further proceedings.

Judge Guaderrama gave me permission to use this writing sample.

Please let me know if I can answer any questions about this writing sample or if you would like me to provide any others.

Respectfully,

Patrick C. Hynds

Patrick Hynds

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ALBERTO CARDONA,	§	
	§	
***Plaintiff*,**	§	
v.	§	
	§	**EP-21-CV-00142-DCG**
KILOLO KIJAKAZI, *in her official capacity as Acting Commissioner of the Social Security Administration*,	§	
	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Plaintiff Alberto Cardona objects to the Magistrate Judge's Report and Recommendation that this Court affirm Defendant Kilolo Kijakazi's, the Acting Commissioner of the Social Security Administration, decision to deny Plaintiff's claims for disability insurance benefits and supplemental security income. Objs., ECF No. 19. Because the Commissioner did not apply the proper legal standard for determining whether Plaintiff's impairments are severe under the Social Security Act, this Court REMANDS this case to the Social Security Administration so the ALJ can assess Plaintiff's claims in light of this Memorandum Opinion and Order.

I. BACKGROUND

On April 29, 2019 and May 6, 2019, Plaintiff filed applications with the Social Security Administration for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act, respectively. R. 72–73. Plaintiff alleged that his disability began on January 15, 2019. R. 75, 81. He alleged the following disabilities (or impairments): major depressive disorder, generalized anxiety disorder, gastroesophageal reflux disease, diabetes mellitus (type II), feet and hands problem, and hypertension. *Id.*

The Commissioner first denied Plaintiff's applications, reasoning that Plaintiff was not disabled. R. 75–87. An Administrative Law Judge (ALJ) later held a de novo hearing on Plaintiff's applications. R. 34–71. In a written decision, the ALJ denied Plaintiff's applications. R. 18–26. The Appeals Council then affirmed the ALJ's decision. R. 1–6.

Plaintiff filed his Complaint in this Court. Compl., ECF No. 1. The Court then referred this case to Magistrate Judge Robert F. Castañeda. Judge Castañeda issued his Report and Recommendation on August 23, 2022, recommending that this Court affirm the Commissioner's decision to deny Plaintiff's applications. R. & R., ECF No. 18. Plaintiff timely filed his objections to the Report and Recommendation. Objs., ECF No. 19. The Commissioner did not file objections or a response to Plaintiff's objections. The Report and Recommendation is ripe for this Court's consideration.

II. DISCUSSION

A. Standard for Reviewing Report and Recommendations

When a party files timely written objections to a magistrate judge's report and recommendation, the district court must "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* FED. R. CIV. P. 72(b)(3); *United States v. Raddatz*, 447 U.S. 667, 676 (1980) ("[I]n providing for a '*de novo* determination,' rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations."). After completing its review, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* FED. R. CIV. P. 72(b)(3).

As to other portions—that is, the unobjected-to portions—of the magistrate judge's report and recommendation, the district court reviews the report and recommendation for clear error, an abuse of discretion, or conclusions that are contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). "A factual finding is clearly erroneous when, based on the evidence as a whole, [the court is] left with the definite and firm conviction that a mistake has been made." *Realogy Holdings Corp. v. Jongebloed*, 957 F.3d 523, 530 (5th Cir. 2020) (quotations omitted).

B. Standard for Reviewing the Social Security Commissioner's Decision

A court's review of the Commissioner's final decision is limited to determining (1) whether the final decision is "supported by substantial evidence" and (2) whether the Commissioner applied the proper legal standards. *E.g.*, 42 U.S.C. § 405(g); *Sun v. Colvin*, 793 F.3d 502, 508 (5th Cir. 2015) (quotation omitted).

Substantial evidence is "more than a mere scintilla and less than a preponderance"—it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Perez v. Barnhart*, 415 F.3d 457, 461 (5th Cir. 2005) (cleaned up). In reviewing the evidence, a court must "scrutinize[] the record" but it "may not reweigh the evidence or substitute its judgment for the Commissioner's." *Id.* If the Commissioner's findings of fact are supported by substantial evidence, they are conclusive. 42 U.S.C. § 405(g); *Perez*, 415 F.3d at 461.

C. Disability Determination

1. Process for Determining Whether a Claimant Is Disabled

Under the Social Security Act, "disability" means an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A); *see also id.* §§ 423(d)(2), (3) (providing more

detailed instructions for determining whether an individual is disabled under the Act). To determine whether an individual (or claimant) is disabled, the Commissioner applies a five-step sequential process, which asks:

(1) whether the claimant is currently performing substantial gainful activity;

(2) whether the claimant has a severe medically determinable physical or mental impairment;

(3) whether the claimant's impairment meets or equals an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;

(4) whether the claimant's impairment prevents them from doing past relevant work; and

(5) whether the claimant's impairment prevents them from performing any other substantial gainful activity.

20 C.F.R. § 404.1520(a); *Salmond v. Berryhill*, 892 F.3d 812, 817 (5th Cir. 2018) (quoting *Kneeland v. Berryhill*, 850 F.3d 749, 753 (5th Cir. 2017)). The Commissioner separately and sequentially evaluates each step in the five-step process—that is, if the Commissioner finds that a claimant is not disabled at any one step, the Commissioner will determine eligibility at that step and "not go on to the next." 20 C.F.R. § 404.1520(a)(4). The claimant bears the burden of proof at steps one through four; the Commissioner bears the burden at step five. *E.g.*, *Salmond*, 892 F.3d at 817.

2. The Commissioner's Determinations in This Case

The Commissioner first determined that Plaintiff had "not engaged in substantial gainful activity since January 15, 2019, the alleged onset date." R. 20–21. In other words, Plaintiff met his burden at step one to show he was not currently performing substantial gainful activity. *See id.* So the Commissioner moved to the second step and found that Plaintiff has a number of

medically determinable impairments,[1] but that none of them are severe—that is, alone or in combination, Plaintiff's impairments do not "significantly limit[] (or [are not] expected to significantly limit) [his] ability to perform basic work-related activities for 12 consecutive months." R. 21; *see also* R. 25. Because the Commissioner found that none of Plaintiff's medical impairments are severe, she concluded that Plaintiff is not disabled under the Act. R. 21–25. The Commissioner did not evaluate steps three through five of the sequential process. R. 25–26; *see also* 20 C.F.R. § 404.1520(a)(4).

D. Analysis

The Magistrate Judge recommends that this Court affirm the Commissioner's decision. Plaintiff argues that this Court should reject the Magistrate Judge's recommendation because (1) the ALJ did not properly evaluate whether Plaintiff has severe impairments and (2) the Magistrate Judge incorrectly concluded that the ALJ properly evaluated Plaintiff's subjective complaints. Objs. at 1–4. As for whether the ALJ properly analyzed the severity of Plaintiff's impairments, Plaintiff seems to argue that the ALJ did not apply the proper legal standard, and even if he did, his decision is not supported by substantial evidence. *See id.* at 1–2 (arguing the ALJ did not apply "the proper measure of severity" and explaining that evidence shows "Plaintiff had severe anxiety episode [sic] with panic attacks" (emphasis removed)).

The Court agrees that the ALJ did not apply the proper legal standard for determining whether Plaintiff's impairments are severe. The relevant regulation says this about severe impairments: "If [the claimant] do[es] not have any impairment or combination of impairments which *significantly limits* [their] physical or mental ability to do basic work activities, [the

[1] The Commissioner found that Plaintiff has the following medically determinable impairments: hypertension, type II diabetes mellitus, hypercholesterolemia, vitamin D deficiency, obesity, depression, and anxiety. R. 21.

Commissioner] will find that [the claimant] do[es] not have a severe impairment and [is], therefore not disabled." 20 C.F.R. § 404.1520(c) (emphasis added). But in a line of cases, the Fifth Circuit has stated and reaffirmed its view that the regulatory definition of "severe impairment" is inconsistent with how the Social Security Act defines disability. *E.g.*, *Estran v. Heckler*, 745 F.2d 340, 341–42 (5th Cir. 1984); *Stone v. Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985); *Loza v. Apfel*, 219 F.3d 378, 390–93 (5th Cir. 2000); *Salmond*, 892 F.3d at 817; *Keel v. Saul*, 986 F.3d 551, 555–56 (5th Cir. 2021).

So under Fifth Circuit precedent, "an impairment can be considered as not severe only if it is a slight abnormality having such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience." *Stone*, 752 F.2d at 1101 (cleaned up). Put differently, "an impairment is severe if it is anything more than a 'slight abnormality' that 'would not be expected to interfere' with a claimant's ability to work." *Salmond*, 892 F.3d at 817. "To show a severe impairment at step two, claimants must only make 'a *de minimis* showing' that the impairment is 'severe enough to interfere with' their ability to work." *Grennan v. Comm'r of Soc. Sec.*, No. 4:21-cv-00645, 2022 WL 2056277, at *5 (N.D. Tex. May 23, 2022) (quoting *Anthony v. Sullivan*, 954 F.2d 289, 293 n.5 (5th Cir. 1992)), *report and recommendation adopted*, 2022 WL 2053168 (N.D. Tex. Jun. 7, 2022); *see also Bowen v. Yuckert*, 482 U.S. 137, 153–54 (1987); *Salmond*, 892 F.3d at 817.

ALJs must scrupulously apply this standard. In fact, there is a presumption that an ALJ applied the wrong legal standard in "cases where the disposition has been on the basis of nonseverity"—that is, where an ALJ ends their analysis after step two—and the ALJ does not cite to or otherwise invoke the proper legal standard. *See Stone*, 752 F.2d at 1106; *Keel*, 986 F.3d at 555 ("ALJs are bound not just to use [the *Stone*] standard but also to cite it (or to an

equivalent authority) in their written decisions; we presume that an ALJ applied the wrong severity standard if it does not."). This does not mean an ALJ must use "magic words," but an ALJ must provide some indication that they applied the correct legal standard. *Keel*, 986 F.3d at 556 (quoting *Hampton v. Bowen*, 785 F.2d 1308, 1311 (5th Cir. 1986)). For example, a court may uphold an ALJ's application of the legal standard when they rely on Social Security Ruling (SSR) 85-28, which uses language similar to *Stone*.[2] *See id.* (holding SSR 85-28 comports with *Stone*).

Citing the standard, however, is also not "magic words." What matters is the application of the standard. As much as an ALJ can properly apply the standard without explicitly invoking the language of *Stone* or SSR 85-28, an ALJ can explicitly invoke the language of *Stone* or SSR 85-28 but not, in fact, apply the proper standard. *Cf. Keel*, 986 F.3d at 555–56 (explaining that there must be an "indication the ALJ applied the correct standard" (quotation omitted)). In other words, an ALJ must be fairly precise with their language and analysis to show they applied the correct legal standard.

For instance, in *Guzman v. Berryhill*, the ALJ concluded that "[t]he claimant's medically determinable mental impairments . . . do not cause more than *minimal limitation* in the claimant's ability to perform basic mental work activities and are therefore nonsevere." No. EP-

[2] In relevant part, SSR 85-28 states:

> [A]t the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments 'of such severity' as to be the basis of a finding of inability to engage in any [substantial gainful activity]. An impairment or combination of impairments is found 'not severe' and a finding of 'not disabled' is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities.

Titles II & XVI: Med. Impairments That Are Not Severe, SSR 85-28 (S.S.A. 1985).

17-CV-312-MAT, 2019 WL 1432482, at *5–6 (W.D. Tex. Mar. 29, 2019) (emphasis added). The court concluded that a "minimal limitation" on a claimant's ability to work does not track the *Stone* standard, *id.* at *6, because *Stone* says an ALJ can conclude that an impairment is not severe only if the impairment is "a *slight abnormality* having such minimal effect on the individual that it *would not be expected to interfere* with the individual's ability to work," *Stone*, 752 F.2d at 110 (emphasis added); *see also Guzman*, 2019 WL 1432482, at *5–6. Because a "minimal limitation" on one's ability to work is greater than no interference with one's ability to work, the court held that the ALJ did not apply the proper legal standard. *See Guzman*, 2019 WL 1432482, at *6.

The same is true here. The ALJ concluded that "the claimant's physical and mental impairments, considered singly and in combination, do not *significantly limit* the claimant's ability to perform basic work activities. *Thus*, the claimant *does not have a severe impairment* or combination of impairments." R. 25 (emphasis added); *see also* R. 21; R. 24 ("[T]he claimant does not have an impairment . . . that significantly limits his . . . ability to perform basic work activities."). At other times in his written decision, the ALJ referred to Plaintiff's impairments as imposing "mild limitation[s]" or "slight[] limit[ations]" on certain functional areas relevant to one's ability to work, such as "understanding, remembering, or applying information." R. 24–25 ("Because the claimant's medically determinable mental impairment causes no more than 'mild' limitation in any of the functional areas, it is non-severe."). The ALJ's language and analysis does not comport with *Stone* or SSR 85-28, especially as applied to Plaintiff's physical impairments.

The ALJ repeats multiple times the "significantly limits" language from 20 C.F.R. § 404.1520(c) that, as discussed, the Fifth Circuit has repudiated. *E.g.*, *Stone*, 752 F.2d at 1101.

When a person's impairment does not "significantly limit" their ability to work—as the ALJ found here—their impairment can still be severe in that it may be more than "a slight abnormality" that "would not be expected to interfere" with the person's ability to work, as *Stone* requires, or a "minimal effect on an individual's ability to work," as *Keel* and SSR 85-28 allow. *See, e.g.*, *Keel*, 986 F.3d at 556; *Andrews v. Astrue*, 917 F. Supp. 2d 624, 634 (N.D. Tex. 2013) ("[U]nder the *Stone* standard, an impairment that causes *any* interference with work ability, even minimal interference, is severe."). Requiring Plaintiff to show that his impairments cause significant limitations on his ability to work contradicts the fact that, at step two, a claimant need only "make a *de minimis* showing that her impairment is *severe enough to interfere with her ability to work*." *See Anthony*, 954 F.2d at 293 n.5 (emphasis added).

The ALJ's analysis of Plaintiff's mental impairments hews closer to the appropriate standard. The ALJ determined that Plaintiff's mental impairment causes "mild" or "slight" functional limitations with his ability to work, R. 24–25, which, under the relevant regulation, may mean his mental impairments are not severe, 20 C.F.R. § 404.1520a(d)(1) (explaining that a limitation rated "as 'none' or 'mild' . . . will generally" mean a claimant's mental "impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in [the claimant's] ability to do basic work activities").[3] Even still, the ALJ's ultimate conclusion was that Plaintiff's "physical *and mental* impairments . . . do not *significantly limit*" Plaintiff's ability to work and are, therefore, not severe. R. at 25 (emphasis added). And this is

[3] Though the Social Security Administration provides this separate regulation on how to determine the severity of a claimant's mental impairment, an ALJ examining a claimant's mental impairment must still apply the *Stone* standard. *E.g.*, *Andrews v. Astrue*, 917 F. Supp. 2d 624, 634–35 (N.D. Tex. 2013).

exactly the strict definition of severity that the Fifth Circuit has rejected as inconsistent with the Social Security Act. *See, e.g.*, *Stone*, 752 F.2d at 1101.

It's true that the ALJ invoked SSR 85-28 when setting out the applicable law, R. 19, but citation to the standard alone does not mean the ALJ in fact applied the correct standard in his analysis. Here, where the ALJ determined that Plaintiff is not disabled at step two, *see Stone*, 752 F.2d at 1106, there is no indication that the ALJ applied the correct standard, *see Hampton*, 785 F.2d at 1311. The Court can't say, for example, the ALJ's conclusion that Plaintiff's impairments are "mild," "slight," or "do not significantly limit" Plaintiff's ability to work, R. 24–25, shows that the ALJ properly applied *Stone* or SSR 85-28.[4] More important than the ALJ's varying descriptions of the severity of Plaintiff's impairments, by consistently coming back to the significantly limits standard, the ALJ appears to have insisted that Plaintiff show that his impairments significantly limit his ability to work. That's the wrong standard.

What's more, the Court can't decide in this case whether the ALJ's failure to apply the proper legal standard is harmless error because the ALJ did not proceed past step two. *See Keel*, 986 F.3d at 556 ("Even if we were to conclude that the ALJ failed to properly apply the *Stone* standard, such a conclusion does not require an automatic reversal—*if* the ALJ proceeds past step two, we consider whether the error was harmless." (emphasis added)); *cf. Snell v. Chater*, 68 F.3d 466, 1995 WL 581550, at *1 (5th Cir. 1995) (per curiam) (unpublished) ("[T]his court has held that when the ALJ's analysis goes beyond Step Two, i.e., to finding a severe impairment,

[4] *See, e.g.*, *Murray v. Kijakazi*, No. 4:20-CV-1707, 2022 WL 824844, at *3 (S.D. Tex. Mar. 18, 2022) (holding ALJ applied wrong legal standard when concluding claimant's impairments "did not significantly limit" his ability to work); *Garcia v. Kijakazi*, No. 4:20-CV-2137, 2022 WL 816481, at *4 (S.D. Tex. Mar. 16, 2022) (similar); *Traci L.B. v. Kijakazi*, No. 3:21-cv-01497-S-BT, 2022 WL 3348956, at *5 (N.D. Tex. July 27, 2022) (holding ALJ applied wrong legal standard because "the ALJ appear[ed] to have required 'remarkable' evidence of psychiatric impairment"); *Walker v. Colvin*, 2015 WL 5836263, at *10–11 (N.D. Tex. Sept. 30, 2015) (holding the ALJ applied the wrong standard even though the ALJ explicitly cited *Stone*).

specific reference to *Stone* and its requirements is not necessary."). Thus, the proper course of action is for the Court to remand this case for the ALJ's consideration in light of this Memorandum Opinion and Order. *See Stone*, 752 F.2d at 1106 ("Unless the correct standard is used, the claim must be remanded to the Secretary for reconsideration.").

III. CONCLUSION

The Court **REJECTS** the Magistrate Judge's Report and Recommendation insofar as it concludes that the ALJ applied the proper legal standard at step two of his analysis under 20 C.F.R. § 404.1520(a)(4). The Court does not reach the other portions of the Report and Recommendation because concluding that the ALJ did not apply the proper legal standard is a sufficient reason to remand this case.

The Court **REMANDS** this case to the ALJ for further consideration consistent with this Memorandum Opinion and Order.

So ORDERED and SIGNED this ___ day of _____ 2022.

_____
DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

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June 26, 2023

The Honorable Stephanie Dawkins Davis
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis,

Please find one of my writing samples attached. This writing sample is entirely my own; it has not been edited by anyone other than myself.

I wrote this draft opinion in a case brought by applicants for the Fulbright-Hays Fellowship. The applicants challenged one of the criteria the Department of Education uses to assess Fulbright-Hays Fellowship applications—a criterion that directs reviewers to award points based on the applicant's foreign language proficiency—as a violation of the Administrative Procedure Act and the U.S. Constitution's equal protection and due process guarantees. One applicant moved for a preliminary injunction. This writing sample is the draft opinion I wrote addressing the applicant's request for a preliminary injunction.

Judge Guaderrama accepted this draft with little edits, and he gave me permission to use this writing sample. I have also pared down some areas to slightly shorten my writing sample.

Please let me know if I can answer any questions about this writing sample or if you would like me to provide any others.

Respectfully,

Patrick C. Hynds

Patrick Hynds

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EDGAR ULLOA LUJAN, SAMAR AHMAD and VERONICA GONZALEZ,	§	
***Plaintiffs*,**	§	
v.	§	
UNITED STATES DEPARTMENT OF EDUCATION, MIGUEL CARDONA, *in his official capacity as Secretary of the U.S. Department of Education*, **and NASSER H. PAYDAR,** *in his official capacity as Assistant Secretary of Postsecondary Education of the U.S. Department of Education*,	§	**3:22-CV-00159-DCG**
***Defendants*.**	§	

MEMORANDUM OPINION AND ORDER

Plaintiffs Edgar Ulloa Lujan, Samar Ahmad, and Veronica Gonzalez—three doctoral students—have sued the U.S. Department of Education ("Department") and its Secretary and the Assistant Secretary of Postsecondary Education, Miguel Cardona and Dr. Nasser H. Paydar, respectively.[1] *See generally* Am. Compl., ECF No. 24. The Department administers the Fulbright-Hays Doctoral Dissertation Research Abroad Fellowship ("Fulbright-Hays

[1] Plaintiffs sued Secretary Cardona and Assistant Secretary Paydar in their official capacities. Am. Compl., ECF No. 24 ¶¶ 5–6. Also, when Plaintiffs filed their lawsuit, they named Michelle Asha Cooper, the former Acting Assistant Secretary of the U.S. Department of Education for Postsecondary Education. *Id.* ¶ 6. The U.S. Department of Education's website shows that Dr. Nasser H. Paydar is now serving as the Assistant Secretary for Postsecondary Education. *See* U.S. Dep't Educ., Office of the Assistant Secretary for Postsecondary Education (last visited Mar. 20, 2023), *available at* https://www2.ed.gov/about/offices/list/ope/oas.html. Under Federal Rule of Civil Procedure 20(d), Dr. Nasser H. Paydar is automatically substituted as the proper defendant. FED. R. CIV. P. 20(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.").

Fellowship"), for which each Plaintiff applied. During the 2022 application cycle, the Department did not award a fellowship to any of the Plaintiffs.

Plaintiffs contend one of the criteria the Department uses to assess applicants—the foreign language proficiency criterion ("Foreign-Language Criterion")—is unlawful. The Department uses the Foreign-Language Criterion to assess an applicant's proficiency in a foreign language of the country the applicant intends to study in. When reviewers assess applications, they award points to each evaluation criteria. Crucially, the Department does not award applicants any points for proficiency in their native language(s). Plaintiffs are each natively fluent in a language other than English, so according to the Department's regulation governing the assessment of foreign language proficiency, each received zero points for foreign language proficiency.

One Plaintiff—Veronica Gonzalez—has moved for a preliminary injunction against Defendants. Mot., ECF No. 25. Gonzalez presses two theories: first, the Department acted outside its statutory authority in issuing the Foreign-Language Criterion and, second, the Foreign-Language Criterion violates the Fifth Amendment of the United States Constitution's due process and equal protection guarantees.[2] *Id.* at 16–31.[3] Agreeing that the Department likely acted outside its statutory authority, and that Gonzalez has otherwise shown she is entitled

[2] Collectively, Plaintiffs assert several theories, not all of which the Court addresses in this opinion and order. Plaintiffs claim that (1) the Department acted outside of its statutory authority in issuing the Foreign-Language Criterion; (2) the Foreign-Language Criterion violates the Fifth Amendment of the United States Constitution's due process and equal protection guarantees; and (3) the Foreign-Language Criterion violates Title VI of the 1964 Civil Rights Act. Am Compl. ¶¶ 117–27, 128–37, 138–44. Plaintiffs Ahmad and Lujan also claim that the Department acted arbitrarily and capriciously when it denied their applications for the Fulbright-Hays Fellowship. *Id.* ¶¶ 145–52. This opinion and order does not address any of Plaintiffs Ahmad and Lujan's claims or the Title VI claim.

[3] Citations to page numbers in this Opinion refer to the pagination assigned by the Court's CM/ECF System, not the documents' internal pagination.

to preliminary relief, the Court **GRANTS IN PART** Gonzalez's Motion and **VACATES** the Foreign-Language Criterion. The Court does not address Gonzalez's constitutional claim.

I. BACKGROUND

A. Statutory and Regulatory Background

The Fulbright-Hays Fellowship has its roots in the Mutual Educational and Cultural Exchange Act, also called the Fulbright-Hays Act, which Congress passed in 1961. In the Act, Congress authorized the President

> to provide for . . . promoting modern foreign language training and area studies in United States schools, colleges, and universities by supporting visits and study in foreign countries by teachers and prospective teachers . . . for the purpose of improving their skill in languages and their knowledge of the culture of the people of those countries . . . .

22 U.S.C. § 2452(b)(6). Congress, in turn, allowed the President to "delegate, to any such officers of the Government as he determines to be appropriate, any of the powers [Congress] conferred upon him" in the Act. *Id.* § 2454(a). In 1962, President John F. Kennedy did just that. He delegated his authority under section 2452(b)(6) to the Department,[4] which was then the Department of Health, Education, and Welfare. Exec. Order No. 11,034, 27 Fed. Reg. 6071, 6072 (1962).

The Department then issued regulations establishing and governing the Fulbright-Hays Fellowship. *See* 34 C.F.R. Part 662. The Fulbright-Hays Fellowship "is designed to contribute to the development and improvement of the study of modern foreign languages and area studies in the United States by providing opportunities for scholars to conduct research abroad." *Id*.

[4] Though Congress delegated section 2452(b)(6) authority to the President, for clarity, throughout the opinion the Court will sometimes refer to the Department instead. Reference to the Department may also be a reference to the Department of Health, Education, and Welfare, which initially promulgated the relevant regulations. *See, e.g.*, 39 Fed. Reg. 43,389, 43,415–16 (1974).

§ 662.1. The Department awards Fulbright-Hays Fellowships to U.S. citizens or permanent residents who are graduate students "planning a teaching career in the United States" and "[p]ossess[] sufficient foreign language skills" to carry out their proposed dissertation project. *Id.* § 662.3. Reviewers assess applications for the Fulbright-Hays Fellowship on a number of metrics, including the Foreign-Language Criterion:

> The applicant's proficiency in one or more of the language (other than English and the applicant's native language) of the country or countries of research, and the specific measures to be taken to overcome any anticipated language barriers.

Id. § 662.21(c)(3).

The current Foreign-Language Criterion dates back to 1998. 34 C.F.R. Part 662, 63 Fed. Reg. 46,358, 46,361–63 (1998). Before then, the Department evaluated whether "[t]he applicant possesse[d] adequate foreign language skills to carry out the proposed project." 34 C.F.R. § 662.32(b)(2)(ii) (1997). So, in 1998, the Department narrowed the scope of Foreign-Language Criterion by adding a requirement that applicants be proficient in a language "other than English and the applicant's native language." 34 C.F.R. § 662.21(c)(3) (1998).

The Department justified its change to the Foreign-Language Criterion by concluding the Fulbright-Hays Fellowship is really about foreign language *training*. *See* 63 Fed. Reg. 46,358, 46,359 (1998). To the Department, foreign language training is fundamentally about the *acquisition* of a new language—that is, a non-native language—not about a person's study and improvement in any language she might already know. *See id.*

During the notice-and-comment rulemaking, one commenter "was troubled by the Department's emphasis in the selection criteria on . . . an acquired (i.e., non-native) foreign language." *Id.* at 46,360. The commenter understood the Fulbright-Hays Act to authorize foreign language exchange programs that "support [] the development of high-end expertise in languages other than English regardless of the method of acquisition." *Id.* But the Department's

overriding concern was based on a "belie[f] that a student conducting research in his or her native language should not enjoy the advantage in the competition that the [previous] regulations provide[d]."[5] *Id.* Thus, the Department kept the proposed Foreign-Language Criterion—the language Gonzalez challenges here.

B. Factual Background

Gonzalez is a doctoral student at the University of California Irvine's Department of Social Ecology.[6] She was born in Santa Maria, CA to parents who immigrated from Mexico.[7] Spanish is her native language; she grew up speaking it at home and learned English in primary school.[8]

Although she learned Spanish at home, Gonzalez sought out formal Spanish-language instruction. In high school, she took two years of Advanced Placement ("AP") Spanish.[9] Continuing her training in college, Gonzalez participated in a research program at University of Southern California that "involved traveling to Mexico to take courses taught in Spanish."[10] And during her doctoral program, she has "participated in the Chicano Latino Emphasis Program" at UC Irvine, which includes Spanish-language courses.[11]

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[5] The Department also wanted "to preserve the program as a vehicle for overseas research by students who have completed the non-native language training under the Department's Title VI Foreign Language and Area Studies (FLAS) Fellowship program." 63 Fed. Reg. 46,358, 46,359 (1998).

[6] Am. Compl. ¶ 85; Gonzalez Decl., Mot. Ex. 2, ECF No. 25-2 ¶ 6.

[7] Am. Compl. ¶ 83; Gonzalez Decl. ¶ 2.

[8] Am. Compl. ¶ 83; Gonzalez Decl. ¶ 3.

[9] Am. Compl. ¶ 84; Gonzalez Decl. ¶ 5.

[10] Gonzalez Decl. ¶ 6; Am. Compl. ¶ 86.

[11] Gonzalez Decl. ¶ 6; Am. Compl. ¶ 86.

Gonzalez is approaching the end of her doctoral studies. But to defend her dissertation on intimate partner violence in Mexico,[12] she needs to conduct one year of research in Mexico.[13] Last year, in April 2022, she sought funding for her Mexico-based dissertation research through the Fulbright-Hays Fellowship program.[14] The Department did not award her a Fulbright-Hays Fellowship.[15] Gonzalez alleges that the Department rejected her application because, under the Foreign-Language Criterion, she received no credit for her Spanish-language skills.[16]

To understand her allegation, we look at the application review process. Two anonymous reviewers assess each application.[17] Reviewers assess applications on a number of metrics, which can be divided into two groups: quality of the proposed project and qualifications of the applicant.[18] The Department assigns each metric a total possible point value. For example, during the 2022 application cycle, an applicant could receive up to 15 points for the quality of their hypothesis and proposed research methods.[19] Now, the heart of this case. During the 2022 application cycle, an applicant could also receive up to 15 points for their "proficiency in one or more of the languages (*other than* English and *the applicant's native language*) of the country or

[12] *See* Technical Review Sheet No. 1, Am. Compl. Ex. 12, ECF No. 24-12, at 3; Technical Review Sheet No. 2, Am. Compl. Ex. 13, ECF No. 24-13, at 3.

[13] *See* Gonzalez Decl. ¶ 10–11.

[14] Gonzalez Decl. ¶ 7; Am. Compl. ¶ 87.

[15] *See* Gonzalez Decl. ¶ 11; Explanation Letter, Am. Compl. Ex. 14, ECF No. 24-14.

[16] *E.g.*, Am. Compl. ¶¶ 88–96.

[17] *Id.* ¶ 88.

[18] 34 C.F.R. § 662.21(b)–(c).

[19] *See id.* § 662.21(b)(1); Technical Review Sheet No. 1 at 3.

countries of research."[20] Applicants, like Gonzalez, who identified themselves as native speakers of a foreign language received zero points.[21]

So despite receiving near perfect scores on each metric—with the glaring exception of foreign language proficiency—Gonzalez fell below the score necessary to receive a Fulbright-Hays Fellowship in 2022.[22] Gonzalez plans to re-apply for a 2023 Fulbright-Hays Fellowship.[23]

C. The Department's Anticipated Rulemaking and Recent Changes

In response to Plaintiffs' lawsuit, the Department began the process of reviewing and possibly amending the Foreign-Language Criterion.[24] The Department's draft notice of proposed rulemaking recently cleared review by the Office of Information and Regulatory Affairs in the Office of Management and Budget.[25] And the Department has just now published a notice of proposed rulemaking in the Federal Register.[26] But it is extraordinarily unlikely that the Department will publish a final rule before the 2023 Fulbright-Hays Fellowship application deadline on April 11, 2023.[27] In fact, the Department does not plan to finish the notice-and-

[20] 34 C.F.R. § 662.21(c)(3) (emphasis added); Technical Review Sheet No. 1 at 6; Technical Review Sheet No. 2 at 6.

[21] Technical Review Sheet No. 1 at 6 ("The applicant is a native speaker of Spanish and therefore does not qualify for points in this category."); Technical Review Sheet No. 2 at 6; Explanation Letter.

[22] *See, e.g.*, Am. Compl. ¶¶ 89–97; Technical Review Sheet No. 1 at 3–8; Technical Review Sheet No. 2 at 3–8.

[23] Gonzalez Decl. ¶ 11.

[24] Resp. at 16–17; Dep't of Educ., Unified Regulatory Agenda, RIN: 1840-AD90 (last visited Mar. 16, 2023), *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1840-AD90.

[25] OIRA, *OIRA Conclusion of EO 12866 Regulatory Review*, https://www.reginfo.gov/public/do/eoDetails?rrid=294011 (review concluded on Mar. 10, 2023).

[26] 88 Fed. Reg. 16,924, 16,924–32 (2023).

[27] *See* 88 Fed. Reg. 8832, 8832 (2023).

comment rulemaking before Gonzalez needs to submit her 2023 Fulbright-Hays Fellowship application.[28] What the Department did do, however, was inform applicants that it will assess only one point, instead of 15, to foreign language proficiency for the 2023 application cycle.[29]

II. JURISDICTION: MOOTNESS

As one part of her requested relief, Gonzalez asks for an order requiring the Department to reevaluate her 2022 application.[30] Mot. at 15, 34–35. The Department says her request for reevaluation is moot because the 2022 appropriation cycle has lapsed and because it has spent the funds Congress appropriated to it for 2022 Fulbright-Hays Fellowships. Resp. at 18–21. The Court agrees.

A. Mootness and Congressional Appropriations

Federal courts are limited by Article III of the U.S. Constitution to "only deciding live cases or controversies." *Spell v. Edwards*, 962 F.3d 175, 178–79 (5th Cir. 2020). Mootness is a jurisdictional doctrine that stops courts from deciding matters that can no longer be characterized as a live dispute. *See id.* at 179–80. "A matter is moot 'when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Id.* at 179 (quoting *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). In the context of a plaintiff's request for congressionally appropriated funds, such a dispute may be moot if the "appropriation has lapsed

[28] *See id.* at 8835 (showing that the Department still plans to evaluate applicant's foreign language proficiency under the Foreign-Language Criterion). The Department is providing the public 30 days to comment on its proposed rule—a period of time that will not elapse before April 11, 2023. *See* 88 Fed. Reg. 16,924, 16,924–32 (2023) (providing April 20, 2023 as the comment deadline).

[29] *See* 88 Fed. Reg. 8832, 8835 (2023) (shifting 14 points to quality of the proposed project).

[30] She also asks that the Court set aside the Department's Foreign-Language Criterion for the 2023 application cycle. Mot. at 34–35. The Department does not challenge the Court's jurisdiction over that part of the dispute. *See* Resp. 18–21.

or has been fully obligated." *See City of Houston v. U.S. Dep't Hous. & Urb. Dev.*, 24 F.3d 1421, 1424 (D.C. Cir. 1994).

When a plaintiff seeks money from a federal agency as a form of relief, two fundamental legal concepts are at play: sovereign immunity and limits on spending congressional appropriations. The sovereign immunity aspect implicates section 702 of the Administrative Procedure Act ("APA"), which "waives the United States' sovereign immunity for actions seeking non-monetary relief against government agencies." *Cambranis v. Blinken*, 994 F.3d 457, 462 (5th Cir. 2021). "Non-monetary relief," however, does not equal "no money whatsoever." Rather, section 702 preserves sovereign immunity over claims for money damages, but waives sovereign immunity for claims to specific relief, even if the specific relief would require the agency to pay money. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 893–94, 900–01 (1988) ("The fact that the mandate is one for the payment of money must not be confused with the question whether such payment . . . is a payment of money as damages or as specific relief.").

The D.C. Circuit has succinctly explained the difference: "[M]oney damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost; specific relief in contrast represents an attempt to restore to the plaintiff that to which it was entitled from the beginning." *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000). So, for example, if a plaintiff participates in a grant program administered by an agency, but the agency does not provide the plaintiff grant money, for whatever allegedly unlawful reason, the plaintiff can seek relief in the form of an injunction requiring the agency to pay the plaintiff the grant money she was entitled to under the program. *See City of Houston*, 24 F.3d at 1425, 1427. That is specific relief, not compensatory damages.